

**OFFICE OF ZONING AND ADMINISTRATIVE HEARINGS**  
**Stella B. Werner Council Office Building**  
**Rockville, Maryland 20850**  
**(240) 777-6660**

**IN THE MATTER OF:**

**POTOMAC FOODS REAL ESTATE, LLC**

Applicant

Mark James

Lee Ann Gudorp

Luke Fetcho

Joseph Caloggero

Thomas Flynn

For the Application

Jody S. Kline, Esquire

Attorney for the Applicant

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OZAH Case No. CU 17-03

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Before: Martin L. Grossman, Hearing Examiner

Director, Office of Zoning and Administrative Hearings

**HEARING EXAMINER'S REPORT AND DECISION**

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## **I. STATEMENT OF THE CASE**

On August 10, 2016, the Applicant, Potomac Foods Real Estate, LLC (hereinafter, “Potomac Foods” or the Applicant), filed an application for a Conditional Use pursuant to Zoning Ordinance §59.3.5.14.E, to permit two drive-thru restaurants at 16004 Shady Grove Road, Gaithersburg, Maryland, in the General Retail GR 1.5, H-45 Zone. Because two drive-thrus were initially sought, the case was captioned as CU 17-03-A and CU 17-03-B. The subject property is on Parcels N017, N016, N019, which is also known as Part of Parcel X in the Washington Industrial Park (Tax Account Numbers 09-01782294, 09-02716114, 09-02714651).

A motion to amend the application was filed on April 21, 2017 (Exhibit 51) and noticed on May 25, 2017 (Exhibit 55). The motion was accompanied by amended plans which reduced the proposed number of drive-thrus to one, an existing Burger King, with three other restaurants also housed on site, but having no drive-thru. The motion was unopposed, and was granted, as announced at the hearing. Tr. 6. Reduced to just one drive-thru, the case was re-captioned as CU 17-03. Exhibit 54.

The subject site is owned by Comprint Court Joint Venture, which has consented to the amended application (Exhibit 57(a)). A restaurant with a drive-thru window currently exists on the site. It was approved under site plan review in accordance with the previous C-3 (Highway Commercial) zoning on the property, prior to adoption of SMA G-956. Thus, there is an existing Site Plan for the property (No. 819810470), which the Applicant has agreed to have revoked if the conditional use is granted. Tr. 14-15.

The site is in the area subject to the 2010 *Great Seneca Science Corridor Master Plan*. Restaurants are permitted uses in the GR Zone, and drive-thru windows are allowed as limited or conditional uses; however, the proposed drive-thru window does not meet the limited use

standards under Zoning Ordinance Section 59.3.5.14.E.2.a, so the Applicant is seeking conditional use approval.

As described by Mark James, Applicant's Vice President for Operations, Potomac Foods owns and operates 29 Burger Kings and other restaurants in Maryland, Virginia, Delaware, and the District of Columbia. The subject Burger King has been on site since about 1975. Tr. 16.

The Office of Zoning and Administrative Hearings (OZAH) originally scheduled a public hearing to be held on December 2, 2016, but on October 18, 2016, the Applicant requested that the hearing be postponed to January 6, 2017, to allow time to amend the plans at the request of the Planning Department. Exhibits 39 and 40. On November 7 and December 5, 2016, the Applicant requested a further postponement of the hearing to March 6, 2017. Exhibits 42 and 43. Additional postponements were requested by the Applicant on December 8, 2016 (Exhibit 44) and March 15, 2017 (Exhibits 46 and 47). After coordinating with the Planning Department (Exhibit 49), an OZAH hearing date was scheduled for July 7, 2017, and a notice of public hearing was issued on May 25, 2017 (Exhibit 55).

The Technical Staff of the Montgomery County Planning Department (Technical Staff or Staff) issued a report on June 9, 2017, recommending approval of the application, subject to four conditions. Exhibit 58. The Planning Board met on June 22, 2017, and voted unanimously (4-0) to recommend approval with the conditions recommended by Staff. The Planning Board's recommendations are contained in the Chair's letter of June 26, 2017. Exhibit 59.

No correspondence either for or against the application was received by either the Hearing Examiner or Technical Staff (Exhibit 58, p. 11).

The public hearing proceeded as scheduled on July 7, 2017. The Applicant called five witnesses – Mark James, Applicant's vice-president for operations (Tr. 15-32); Lee Ann Gudorp, an expert in site design and project management (Tr. 32-61); Luke Fetcho, a civil

engineer (Tr. 62-67); Joseph Caloggero, a traffic engineer (Tr. 67-78); and Thomas Flynn, a Market Demand Analyst (Tr. 79-93). A revised Needs analysis (Exhibit 63) and a revised traffic study (Exhibit 64), which had been previously submitted to Technical Staff, were filed at the hearing. The plans remained unchanged, but the Applicant produced 4 rendered versions at the hearing (Exhibits 65, 66(a), 66(b) and 68). Finally, the Applicant introduced the July 15, 2016 memorandum showing approval of the Preliminary Forest Conservation Plan (Exhibit 67) and a May 18, 2017 approval by the Department of Permitting Services (DPS) of Applicant's stormwater management concept plan (Exhibit 69). The record closed, as scheduled, on July 17, 2017, following receipt of electronic copies of the new exhibits and the hearing transcript.

For the reasons set forth in this Report and Decision, the Hearing Examiner approves the conditional use application, subject to the conditions listed in Part IV.

## **II. FACTUAL BACKGROUND**

### **A. The Subject Property**

The subject site is located on the west side of Shady Grove Road in Gaithersburg, Maryland, between MD 355 and I-270, and just south of I-370, as can be seen on the following portion of the location map supplied in the Technical Staff Report (Exhibit 58, p. 3):

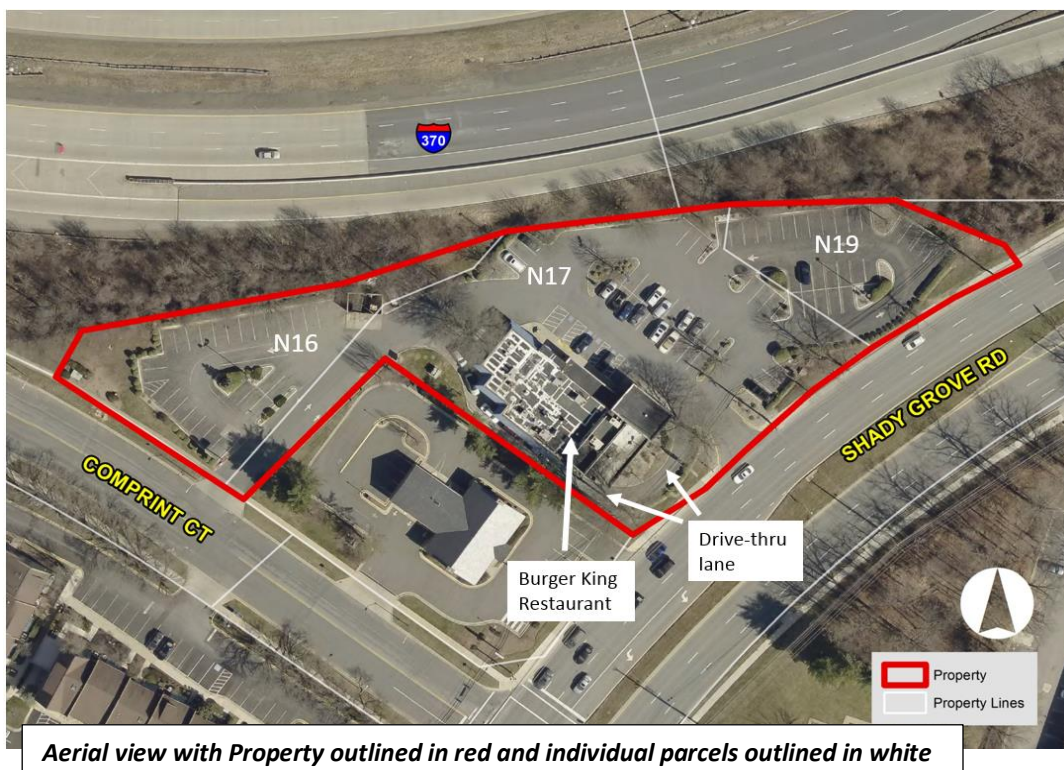


The subject site was constructed under an existing site plan (No. 819810470), which will be abandoned following approval of the conditional use. Tr. 14-15. The property is currently zoned for General Retail (GR 1.5, H-45), and Technical Staff described it as follows (Exhibit 58, p. 3):

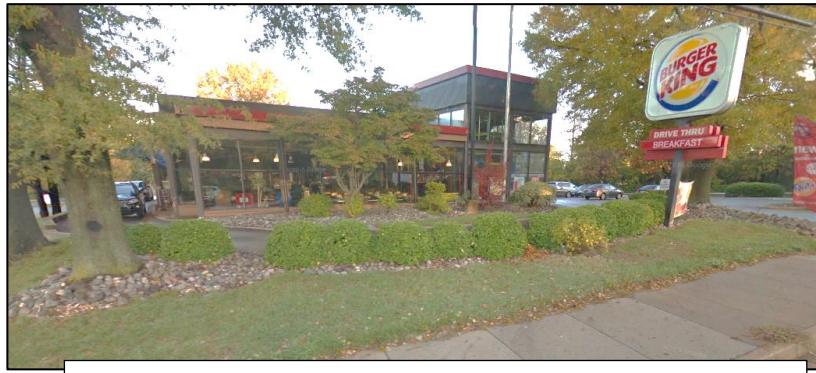
The Property . . . comprises three parcels, identified as Parcels N16, N17, and N19 located on Tax Map FS562, with a total area of approximately 1.71 acres. Parcel N19 is unplatted. . . . The Property is currently improved with a 6,589-square-foot Burger King restaurant with a drive-thru window, associated surface parking, and a small storage shed. The Property is irregular in shape with frontage on Shady Grove Road and Comprint Court. Vehicular access is available from both roads, but access from Shady Grove Road is limited to westbound right-in right-out only because of the existing raised median in the middle of Shady Grove Road. The existing driveway from Comprint Court allows full movement access. Eastbound Shady Grove Road traffic can access the site via the Shady Grove Road/Comprint Court intersection.

According to the amended Site Layout (Exhibit 51(d)), there are no 100-year floodplains on this site; there are no rare, threatened & endangered species or critical habitats; there are no champion trees; there are no streams or wetlands; and there are no historic resources on site.

The existing site is depicted in a photograph and aerial photo from the Staff report (Exhibit 58, p. 4):



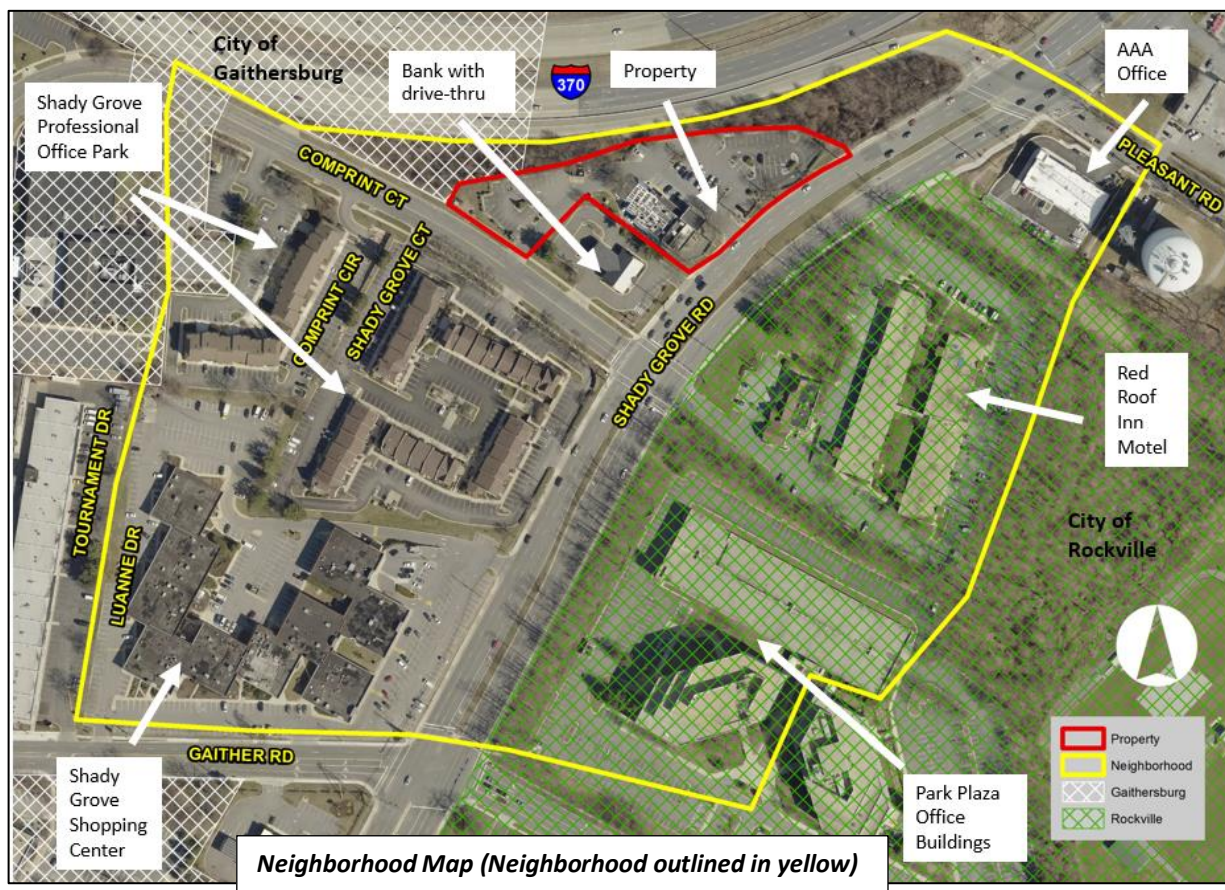




**Existing Burger King (from Shady Grove Road facing northeast)**

## B. Surrounding Neighborhood

For the purpose of determining the compatibility of the proposed use, it is necessary to delineate and characterize the “surrounding neighborhood” (*i.e.*, the area that will be most directly impacted by the proposed use). Staff proposed defining the boundaries of the surrounding neighborhood as “generally bound by the I-370 right-of-way, Comprint Court, Shady Grove Road and Pleasant Road to the north, Tournament Drive to the west, Gaither Road to the south, and various lot lines to the east . . .” Exhibit 58, p. 5. It is depicted below in Staff’s Map:



**Neighborhood Map (Neighborhood outlined in yellow)**

As described by Technical Staff (Exhibit 58, p. 5),

The subject Property abuts the City of Gaithersburg, and the City of Rockville is across Shady Grove Road. Most of the properties in the eastern portion of the Neighborhood are within the City of Rockville, and properties in the northwest corner are within the City of Gaithersburg. The Neighborhood consists entirely of commercial development including offices, a motel, a drive-thru bank, and various retail/service uses. The Neighborhood does not contain any existing conditional uses.

The Applicant accepted Staff's proposed definition of the neighborhood (Tr. 15), as does the Hearing Examiner, since it fairly includes those that will be most directly impacted by the proposed use.

### **C. Proposed Use**

The Applicant seeks approval of a conditional use to continue to operate its drive-thru and the existing Burger King, but with modifications that include the following, as described by Technical Staff (Exhibit 58, pp. 5-6):

The Applicant proposes to expand the existing restaurant by 1,500 square feet to create a building with a total area of 8,100 square feet. Four food service providers, including Burger King, will be located within the expanded restaurant (Figure 5). Burger King will operate the proposed drive-thru, and will occupy 1,980 square feet of the expanded building. The building will also include a 4,356-square-foot dining court. The Applicant anticipates that the other food providers within the proposed building will be a 681-square-foot "coffee concept" shop, a 683-square-foot sandwich shop, and a 400-square-foot salad shop. Restaurants are permitted uses in the GR Zone, and drive-thru windows are allowed as limited or conditional uses. The proposed drive-thru window does not meet the limited use standards under Section 3.5.14.E.2.a, so the applicant is seeking conditional use approval.

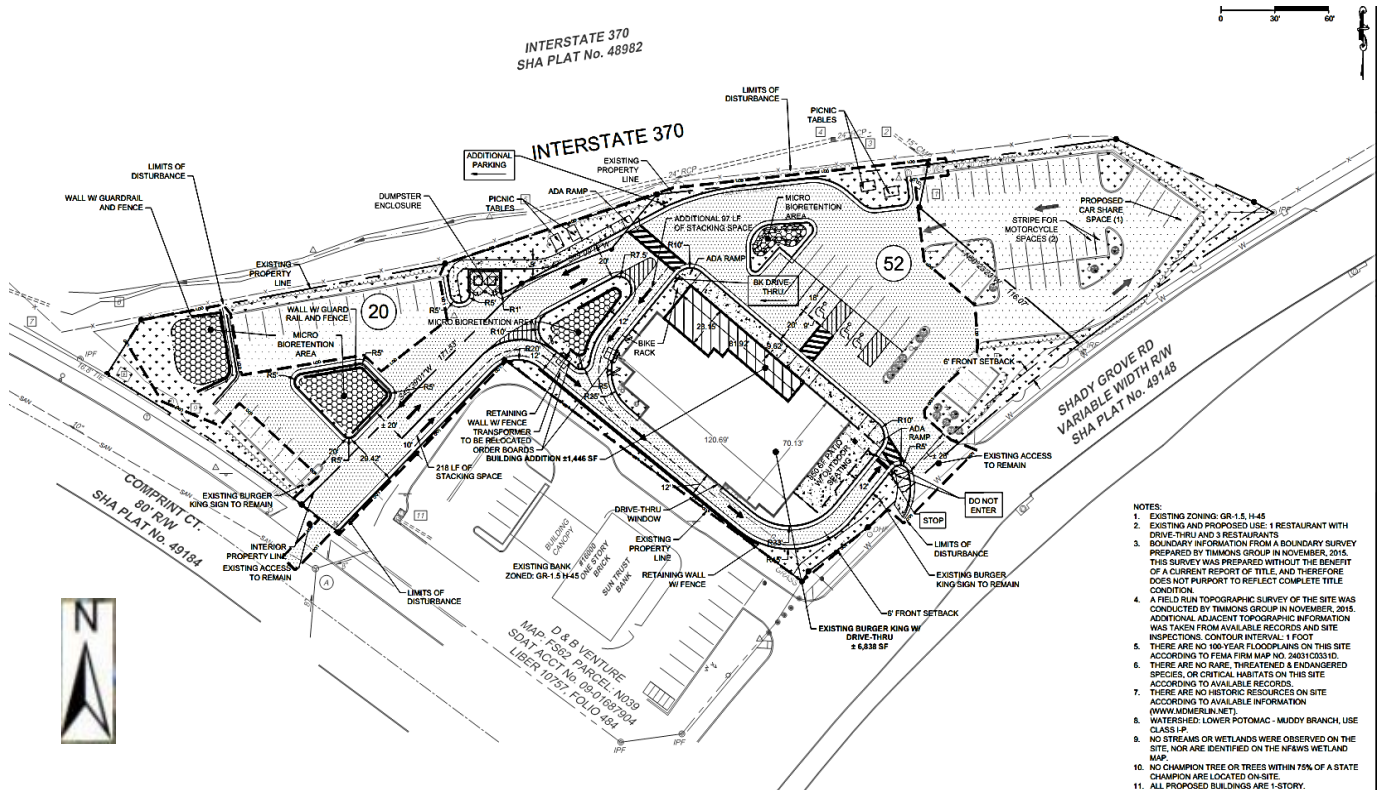
The applicant is proposing a double drive-thru (two order windows) and a single window for payment and food delivery. Burger King and the associated drive-thru will be open from 6:00 a.m. until 1:00 am and will offer full breakfast, lunch, and dinner menus. The restaurant will employ up to 40 people; up to 12 employees will work during the busiest shift from 11:00 a.m. to 2:00 p.m. The Applicant indicated that the Burger King is typically busiest during lunch and dinnertime.

Mr. James testified at the hearing that he would plan to close the lobby down at 11:00 p.m. on weekdays, and at midnight on Saturdays and Sundays. His testimony also suggested a number of employees greater than Staff's summary above. He indicated there were about 45

employees of the Burger King, with 14 people on the busiest shift. A few employees may be added for the Bojangles or the coffee concept. Tr. 26-27.

## 1. Site Plan and Elevations

The Applicant's Revised Conditional Use Site Layout (Exhibit 51(d)) is reproduced below:



### PROPOSED CONDITIONS LEGEND:

LEGEND:	
PROPERTY BOUNDARY	— — — — —
LIMITS OF DISTURBANCE	— — — — —
PROPOSED CONTOUR	— — — — —
EXISTING CONTOUR	- - - - -
COMMUNICATION LINE	— — — — —
GAS LINE	— — — — —
SANITARY SEWER LINE	— — — — —
SANITARY SEWER MANHOLE	●
CLEANOUT	⊙
WATERLINE	— — — — —
WATER METER	⊙
CURB AND GUTTER	— — — — —
GUARD RAIL	— — — — —
FENCE	— — — — —
PROPOSED DRIVE-THRU QUEUING	— — — — —
SITE SIGN	— — — — —

### HATCH LEGEND:

HEAVY DUTY ASPHALT	
EXISTING ASPHALT	
HEAVY DUTY CONCRETE	
CONCRETE SIDEWALK	
ESD/BIORETENTION	
LAWN/LANDSCAPE OPEN SPACE	



## NOTES:

1. EXISTING ZONING: GR-1.5, H-45
2. EXISTING AND PROPOSED USE: 1 RESTAURANT WITH DRIVE-THRU AND 3 RESTAURANTS
3. BOUNDARY INFORMATION FROM A BOUNDARY SURVEY PREPARED BY TIMMONS GROUP IN NOVEMBER, 2015. THIS SURVEY WAS PREPARED WITHOUT THE BENEFIT OF A CURRENT REPORT OF TITLE, AND THEREFORE DOES NOT PURPORT TO REFLECT COMPLETE TITLE CONDITION.
4. A FIELD RUN TOPOGRAPHIC SURVEY OF THE SITE WAS CONDUCTED BY TIMMONS GROUP IN NOVEMBER, 2015. ADDITIONAL ADJACENT TOPOGRAPHIC INFORMATION WAS TAKEN FROM AVAILABLE RECORDS AND SITE INSPECTIONS. CONTOUR INTERVAL: 1 FOOT
5. THERE ARE NO 100-YEAR FLOODPLAINS ON THIS SITE ACCORDING TO FEMA FIRM MAP NO. 24031C0331D.
6. THERE ARE NO RARE, THREATENED & ENDANGERED SPECIES, OR CRITICAL HABITATS ON THIS SITE ACCORDING TO AVAILABLE RECORDS.
7. THERE ARE NO HISTORIC RESOURCES ON SITE ACCORDING TO AVAILABLE INFORMATION (WWW.MDMERLIN.NET).
8. WATERSHED: LOWER POTOMAC - MUDDY BRANCH, USE CLASS I-P.
9. NO STREAMS OR WETLANDS WERE OBSERVED ON THE SITE, NOR ARE IDENTIFIED ON THE NF&WS WETLAND MAP.
10. NO CHAMPION TREE OR TREES WITHIN 75% OF A STATE CHAMPION ARE LOCATED ON-SITE.
11. ALL PROPOSED BUILDINGS ARE 1-STORY.

Property Information	
Subject	Parcel N016/N017/N019
	16004 Shady Grove Road
	Bethesda, MD 20814-6101
	L.7765, F.289
Property Owner:	Comprint Court Joint Venture
Existing Parcel Area	0.39/1.05/0.27; Total = 1.71
Zoning Classification:	GR-1.5, H-45
Tax ID Number:	2716114/1782294/2714651
Existing Use:	Commercial
Proposed Use:	Commercial
District:	9
Account NO.	1782294/2714651/2716114

General Retail (GR) Zoning Data Table

	Permitted / Required	Provided
Maximum FAR - Sec 4.6.2 (A)	1.5	0.11
Maximum Building Height - Sec 4.6.2 (A)	45'	21'
Minimum Amenity Open Space >10,000 SF - Sec 4.6.3 ( C)	10% (7449 SF)	14.58% (10861.06) SF
Lot Size	N/A	-
Lot Coverage	N/A	-
Minimum Principal Building Setback - Front	0'	0'
Minimum Principal Building Setback - Side	0'	0'
Minimum Principal Building Setback - Rear	0'	0'
Queueing Length per Drive-Thru Aisle	105'	166' - 218'

## Parking and Loading Required per Section 6.2.4B, Restaurant:

= 4 spaces / 1000 SF

Total Parking Required..... 33 Spaces

Total Parking Provided..... 72 Spaces

## Handicapped Parking Spaces Required:

Total Handicapped Parking Required..... 2 + 1 (Van) Spaces

Total Handicapped Parking Provided..... 3 (Van) Spaces

## Bicycle Parking Spaces Required:

= 1 Bike Space (10 max) / 10,000 SF, 15% Long Term

Total Bike Spaces Required..... 1 Bike Space (1 Long Term)

Total Bike Spaces Provided..... 1 Bike Space (1 Long Term)

## Motorcycle Spaces Required:

= 2% of Total Parking Provided or 10 Maximum

Total Motorcycle Spaces Required..... 2 Motorcycle Spaces

Total Motorcycle Spaces Provided..... 2 Motorcycle Spaces

## Car Share Spaces Required:

Total Car Share Spaces Required..... 1 Car Share Space

Total Car Share Spaces Provided..... 1 Car Share Space

In addition to the notations on the Site Layout, conditions are imposed in Part IV of this Report and Decision, at the recommendation of Technical Staff and the Planning Board (Exhibits 58 and 59), requiring that the Applicant “must provide at least one long-term bicycle parking space consisting of a bike locker in a well-lit location or a designated secured bike room for employees” and that “the existing site plan (No. 819810470) must be abandoned.” The Applicant does not object to any of the conditions recommended by Technical Staff. Tr. 32.

The Applicant has also provided Elevations (Exhibits 51(b)(i) and (ii)), showing the proposed structures for the site. The rendered versions (Exhibits 66(a) & (b)) are shown below:



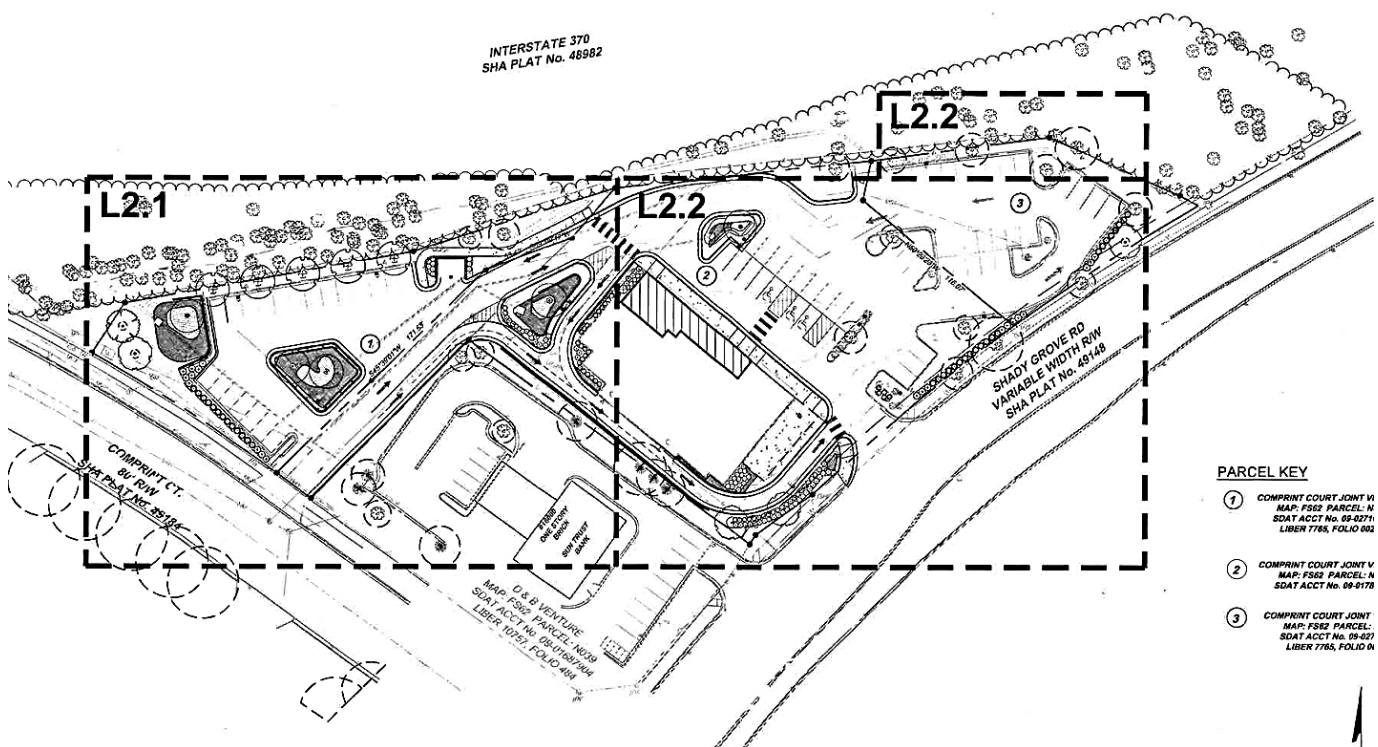


Mr. James testified that the exterior building materials were selected to match the colors and architecture of the surrounding structures. Tr. 28-30.

## 2. Site Landscaping, Lighting and Signage

### a. Landscaping Plan

The proposed landscaping is shown on the Revised Landscaping Plans (Exhibits 51(k)(i) through (iv)). Technical Staff reports that “Proposed landscape plantings include shrubs and trees between the parking lot/drive-thru lane and both road frontages.” Exhibit 58, p. 6. The overall Landscape Plan (Exhibit 51(k)(i)) is reproduced below, followed by Tables from the Landscape Notes and Details Plan (Exhibit 51(k)(iv)):



MONTGOMERY COUNTY LANDSCAPE REQUIREMENTS						
ORDINANCE	REQUIREMENT	RATIO	CALCULATION	REQUIRED QUANTITY	EXISTING QUANTITY	PROPOSED QUANTITY
SECTION 6.2.9 PARKING LOT LANDSCAPING AND OUTDOOR LIGHTING	LANDSCAPED AREA	5% OF TOTAL PARKING LOT AREA (ALL PAVED AREAS)	PARKING AREA = 39,017 SF x 0.05 = 1,950 SF LANDSCAPED AREA	1,950 SF LANDSCAPED AREA	N/A	5,665 SF LANDSCAPED AREA
	TREE CANOPY	25% COVERAGE OF PARKING LOT AT 20 YEARS OF GROWTH	39,017 SF PARKING AREA x .25 = 9,754 SF CANOPY AREA	9,754 SF CANOPY AREA	1,903 SF CANOPY AREA	11,186 SF PROPOSED CANOPY AREA 1,903 SF EXISTING CANOPY AREA 13,091 SF TOTAL CANOPY AREA
	PERIMETER PARKING	<ul style="list-style-type: none"> <li>PLANTING AREA 6 FT WIDE</li> <li>HEDGE 3 FT HT</li> <li>CANOPY TREES 30 FT O.C.</li> </ul>	N/A	N/A	N/A	REQUIREMENT MET WITH EVERGREEN HEDGE AND TREES, WITH THE EXCEPTION OF ANY AREA WHERE THE PROXIMITY OF UTILITIES PRECLUDES THE PLANTING OF CANOPY TREES.

SPECIMEN TREE MITIGATION PLANTINGS				
ORDINANCE	REQUIREMENT	REQUIRED	CALCULATION	PROVIDED
REVIEW COMMENTS BY PLANNING STAFF: JULY 15, 2016	SPECIMEN TREE MITIGATION	28.5 CALIPER INCHES OF NATIVE TREE CANOPY, USING 3" CALIPER TREES	10 TREES X 3" CALIPER =	30 CALIPER INCHES

PLANT SCHEDULE						
TREES	QTY	BOTANICAL NAME	COMMON NAME	MINIMUM INSTALLED SIZE	ROOT	REMARKS
ACE RUB	5	ACER RUBRUM "AUTUMN GLORY"	AUTUMN GLORY MAPLE	3" CAL	B&B	
NYS WIL	1	NYSSA SYLVATICA "WILDFIRE"	BLACK GUM	3" CAL	B&B	
QUE PHE	4	QUERCUS PHELOS	WILLOW OAK	3" CAL	B&B	
SHRUBS	QTY	BOTANICAL NAME	COMMON NAME	MINIMUM INSTALLED SIZE	ROOT	SPACING
ABE RAD	24	ABELIA X GRANDIFLORA "RADIANCE"	GLOSSY ABELIA	3 GAL	CONTAINER	3.5' O.C.
ABE ROS	13	ABELIA X GRANDIFLORA "ROSE CREEK"	GLOSSY ABELIA	18" SPRD	CONTAINER	3' OC
BUX JOH	21	BUXUS MICROPHYLLA "JOHN BALDWIN"	LITTLELEAF BOXWOOD	30" HT.	CONTAINER	
HYD LIL	1	HYDRANGEA PANICULATA "LITTLE LIME"	HYDRANGEA	24" HT/SPRD	CONTAINER	5' OC
ILE NAN	10	ILEX CORNUTA "BURFORDII NANA"	DWARF BURFORD HOLLY	36" HT/SPRD	CONTAINER	3' OC
ILE COR	54	ILEX CORNUTA "CARISSA"	CARISSA HOLLY	3 GAL	CONTAINER	24" OC
ILE HOO	26	ILEX CRENATA "HOOGENDOORN"	JAPANESE HOLLY	18" SPRD	CONTAINER	3' OC
ROS MEI	5	ROSA X "MEIGALPIDO"	RED DRIFT ROSE	24" SPRD.	CONTAINER	4' O.C.
THU LIT	34	THUJA OCCIDENTALIS "LITTLE GIANT"	ARBORVITAE	24" HT/SPRD	CONTAINER	
GROUND COVERS	QTY	BOTANICAL NAME	COMMON NAME	MINIMUM INSTALLED SIZE	ROOT	SPACING
IRI CEA	81	IRIS SIBIRICA "CAESAR'S BROTHER"	CAESAR'S BROTHER SIBERIAN IRIS	1 GAL	CONTAINER	18" O.C.
JUN CON	57	JUNIPERUS CONFERTA "BLUE PACIFIC"	BLUE PACIFIC JUNIPER	1 GAL	CONTAINER	18" O.C.
LIR VAR	24	LIRIOPE MUSCARI "VARIEGATA"	VARIEGATED LILY TURF	2 QT	CONTAINER	24" O.C.
PER XLS	16	PEROVSKIA X "LITTLE SPIRE"	RUSSIAN SAGE	3 QT.	CONTAINER	24" O.C.

Lee Ann Gudorp, Applicant's expert in Site Design and Project Management, testified that the intent of the Landscaping Plan was to preserve as many existing trees as possible. Three trees had to be removed, but the Applicant is providing the mitigation by installing 10 three-inch caliper trees elsewhere on the site. Applicant is also supplementing trees along Shady Grove with additional shrubs and plantings and also some foundation planting around the building. The proposed micro-bioretention basins on the site will be planted as well. Trees will be added along the parking row, and plantings around the dumpster and on the north end of the site. According to Ms. Gudorp, the Applicant will exceed landscaping requirements. Tr. 48-49.

The proposed landscaping can be best seen on the Rendered Site Plan (Exhibit 65), reproduced on the next page:





### b. Lighting Plans

The Applicant submitted a Photometric Plan (Exhibit 51(l)) and Lighting Details (Exhibit 51(m)). According to Technical Staff, “the Photometric Plans indicate that 13 luminaires will illuminate the building and parking lot.” Exhibit 58, p. 6. Ms. Gudorp testified that the lighting will be adequate for safety but not intrusive into neighboring properties. Tr. 55-56. Tables and depictions of the light fixtures from the plans are reproduced below:

Luminaire Schedule								
Symbol	Qty	Label	Arrangement	Description	LLF	Lumens/Lamp	Arr. Lum. Lumens	Arr. Watts
	7	A	SINGLE	XLCS-FT-LED-HQ-CW-HSS-SINGLE ON 20' POLE + 2' BASE	1.000	NA	12489	138.7
	4	B	D180	XLCS-5-LED-HQ-CW-D180 ON 20' POLE + 2' BASE	1.000	NA	31348	276.4
	2	C	SINGLE	XPWS3-FT-LED-48-450-CW-UE - 10' MH	1.000	NA	6159	72

Calculation Summary							
Label	CalcType	Units	Avg	Max	Min	Avg/Min	Max/Min
ALL CALC POINTS AT GRADE	Illuminance	Fc	1.91	21.5	0.0	N.A.	N.A.
PARKING AND DRIVE SUMMARY	Illuminance	Fc	3.55	21.5	0.5	7.10	43.00

#### LED AREA LIGHTS - LSI SLICE SMALL (XLCS)



US & Int'l. patents  
**SMARTTEC™** - L  
 temperatures &  
**ENERGY SAVING**  
 others. Availab  
**EXPECTED LIFE** -  
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**LEDS** - Select hig  
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**DISTRIBUTION/P**  
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 available for irr  
 distribution.  
**HOUSING** - One-

#### LED PATRIOT® WALL SCONCE (XPWS3)



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**c. Signs**

Technical Staff notes that “the Applicant plans to retain the existing Burger King sign on Shady Grove Road, which directs vehicles to turn right at Comprint Court to access the drive-thru, although cars will also be able to access the drive-thru from the Shady Grove Road entrance. The Applicant also proposes wayfinding signage to facilitate internal circulation.”

Exhibit 58, p. 7. Staff provided a photograph of the existing sign on Shady Grove Road:



The Revised Site Layout (Exhibit 51(d)) depicts the locations of the existing Burger King Signs at the two entrances (not just the one sign mentioned by Technical Staff on pages 7 and 15 of the Staff Report), and notes that they will both remain. Staff does mention the second sign on page 11 of the Staff report – “The Applicant has complied with signage requirements along the Shady Grove Road and Comprint Court frontages.” If the Applicant subsequently elects to change those signs, any signage must comply with applicable Zoning Ordinance standards and is subject to permits issued by the Department of Permitting Services. A condition is imposed in Part IV of this Report and Decision to that effect.

**3. Environment - Forest Conservation and Stormwater Management Plans**

The Applicant filed a Natural Resources Inventory/Forest Stand Delineation for the subject site (NRI/FSD No. 420160950). Exhibit 17. It was approved by Technical Staff on January 29, 2016 (Exhibit 17(a)). Technical Staff reports that “The site contains no streams or their buffers,

wetlands or their buffers, steep slopes, 100-year floodplains, or known habitats of rare, threatened, and endangered species” Staff concluded “This plan is in compliance with the Environmental Guidelines.” Exhibit 28, p. 11.

### a. Forest Conservation

The Applicant filed a Preliminary Forest Conservation Plan (Exhibit 51(j)) in this case, and two Tables therefrom are reproduced below:

FOREST CONSERVATION WORKSHEET						
Shady Grove Restaurant Redevelopment Group						
<b>NET TRACT AREA:</b>						
A. Total tract area					1.70	
B. Land dedication acres (parks, county facility, etc.)					0.00	
C. Land dedication for roads or utilities (not being constructed by this plan)					0.00	
D. Area to remain in commercial agricultural production/use					0.00	
E. Other deductions (specify)					0.00	
F. Net Tract Area					1.70	
<b>LAND USE CATEGORY: (from Trees Technical Manual)</b>						
Input the number "1" under the appropriate land use, limit to only one entry.						
	ARA	MDR	IDA	HDR	MPD	CIA
	0	0	0	0	0	1
G. Afforestation Threshold					15%	x F = 0.26
H. Conservation Threshold					15%	x F = 0.26
<b>EXISTING FOREST COVER:</b>						
I. Existing forest cover						0.00
J. Area of forest above afforestation threshold						0.00
K. Area of forest above conservation threshold						0.00
<b>BREAK EVEN POINT:</b>						
L. Forest retention above threshold with no mitigation						0.00
M. Clearing permitted without mitigation						0.00
<b>PROPOSED FOREST CLEARING:</b>						
N. Total area of forest to be cleared						0.00
O. Total area of forest to be retained						0.00
<b>PLANTING REQUIREMENTS:</b>						
P. Reforestation for clearing above conservation threshold						0.00
Q. Reforestation for clearing below conservation threshold						0.00
R. Credit for retention above conservation threshold						0.00
S. Total reforestation required						0.00
T. Total afforestation required						0.26
U. Credit for landscaping (may not exceed 20% of "S")						0.00
V. Total reforestation and afforestation required						0.26

**PRELIMINARY FOREST CONSERVATION PLAN NARRATIVE:**  
 IN CONFORMANCE WITH THE FOREST CONSERVATION LAW AND GUIDELINES SET FORTH IN THE TREES TECHNICAL MANUAL, THIS PRELIMINARY FOREST CONSERVATION PLAN APPROPRIATELY OUTLINES THE INTENTIONS FOR PRESERVING EXISTING FOREST ON SITE AND REFORESTING/AFFORESTING OTHER AREAS PER THE RESULTS OF THE WORKSHEET TO THE RIGHT.

THE EXISTING FOREST AND INDIVIDUAL TREES THAT ARE TO BE PRESERVED ON SITE WILL BE PROTECTED BY THE APPROPRIATE TREE PROTECTION MEASURES. A TREE VARIANCE REQUEST HAS BEEN SUBMITTED FOR THE REMOVAL OF THREE SPECIMEN TREES (30 INCHES OR MORE DBH) RECORDED IN THE TREE TABLE AT LEFT. SPECIMEN TREE MITIGATION OF 28.5 CALIPER INCHES WILL BE MET BY THE INSTALLATION OF TEN 3" CALIPER TREES ON SITE.

THE URBAN SETTING AND REDEVELOPMENT CONTEXT OF THIS SITE PRECLUDE MEETING THE AFFORESTATION REQUIREMENT OF 0.26 ACRES WITH FOREST COVER. THE EXISTING CONSTRAINTS AND PROPOSED LAYOUT AND STORMWATER MANAGEMENT FEATURES NECESSARY TO MEET COUNTY REQUIREMENTS DO NOT ALLOW FOR AMPLE AREA TO PLANT FOREST. THE AFFORESTATION REQUIREMENT WILL INSTEAD BE SATISFIED WITH EXISTING TREE COVER TO REMAIN AND IN THE ADDITION OF TREES PROPOSED ON THE LANDSCAPE PLAN. EXISTING AND PROPOSED TREE COVER EXCEEDS THE REQUIREMENT OF 0.26 ACRES.

The Applicant's Preliminary Forest Conservation Plan (PFCP) and its associated tree variance request were conditionally approved by Technical Staff on July 15, 2016. Exhibit 67.



Staff concluded (Exhibit 58, p. 11):

This application is in compliance with the requirements of Chapter 22A, Forest Conservation. There is no forest on the site. A Preliminary Forest Conservation Plan was approved for this site on July 15, 2016 (PFCP No. SC2016015). The land use, zoning and net tract area yield an afforestation requirement of 0.26 acres of forest planting. Approval of a Final Forest Conservation Plan is required prior to any clearing, grading, or demolition on the site.

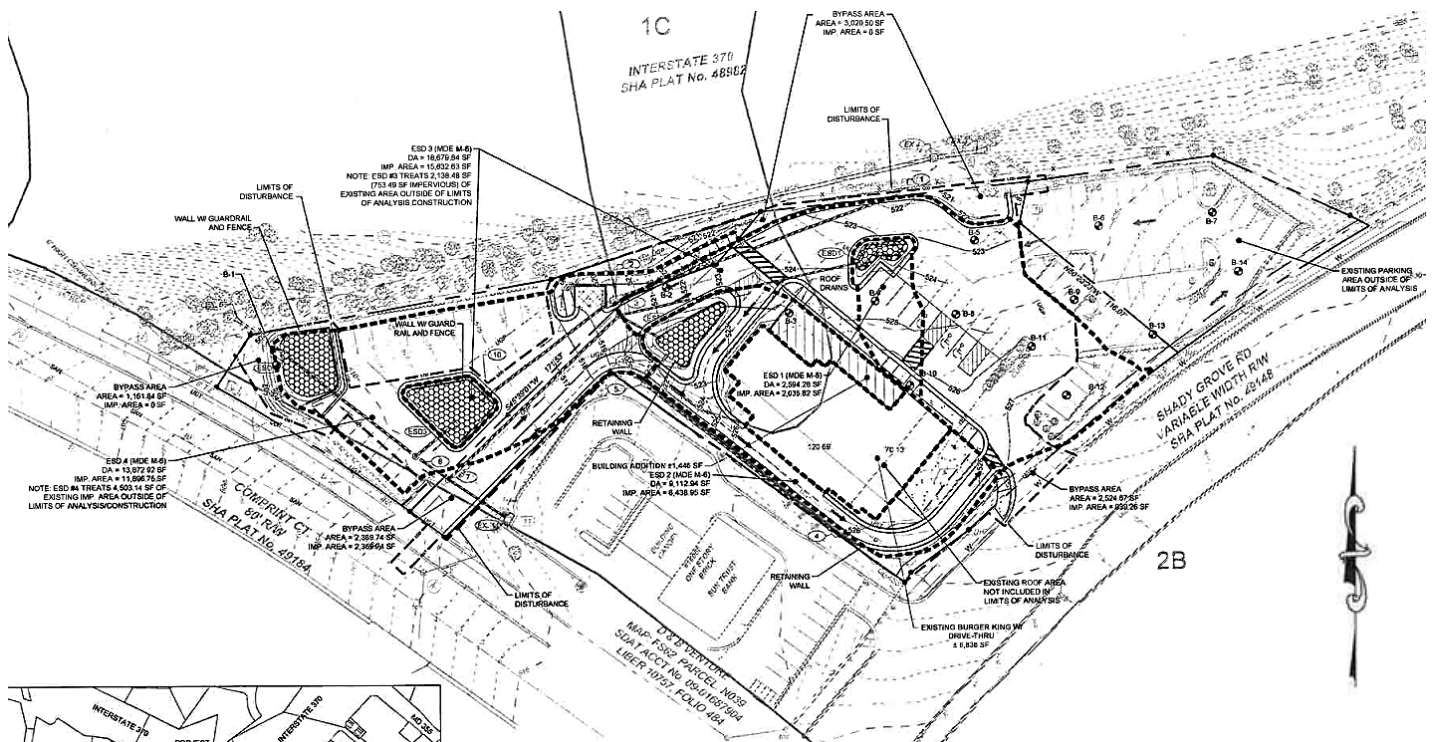
To ensure compliance, Technical Staff recommended a condition requiring that “The Applicant must obtain approval of a Final Forest Conservation Plan consistent with the approved Preliminary Forest Conservation Plan prior to any clearing, grading or demolition on the site.”

Exhibit 58, p. 2. The Planning Board noted the approval of the PFCP and tree variance in its letter of June 26, 2017 (Exhibit 59).

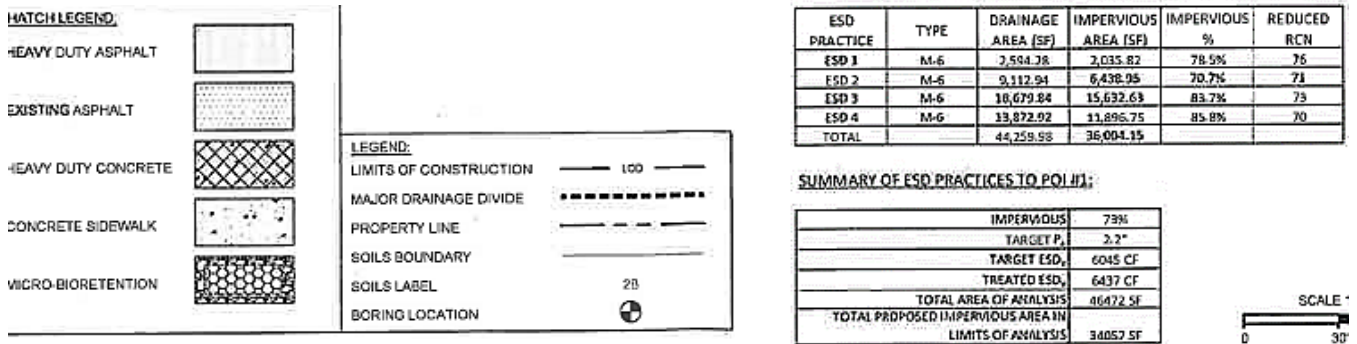
The Hearing Examiner has included Staff’s recommended condition as a condition of the conditional use in Part IV of this Report and Decision.

### **b. Stormwater Management Concept Plan**

The Applicant’s ESD [Environmental Site Design] Stormwater Management Concept Plan (Exhibit 51(h)) is reproduced below:





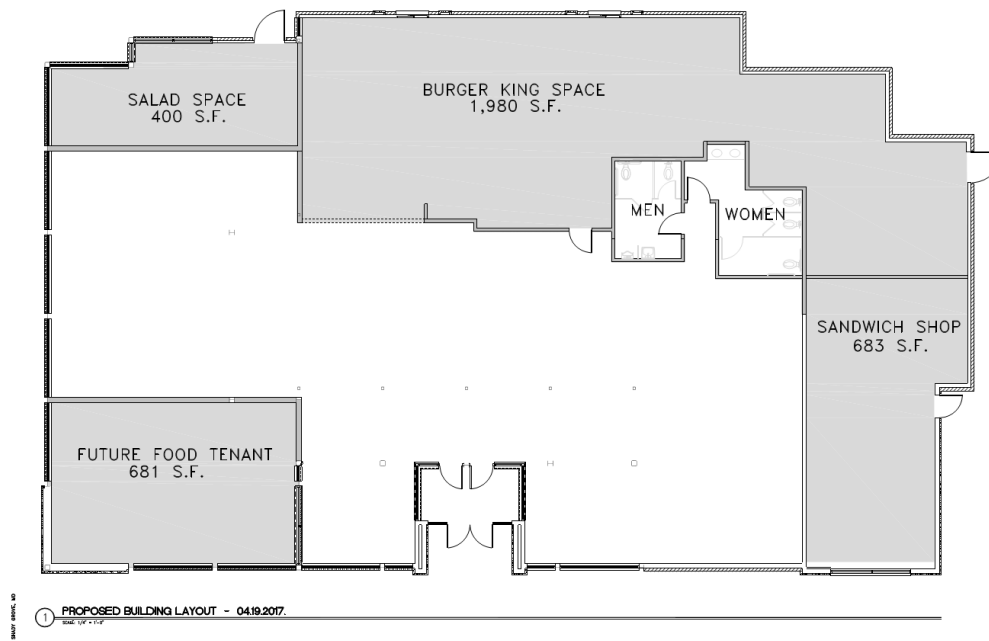


Technical Staff reports that the Applicant “will upgrade the stormwater management facilities to comply with current regulations, and Environmental Site Design (ESD) techniques will be used to the maximum extent practicable in the redevelopment of the Property.” Exhibit 58, p. 8. Moreover, the Applicant’s ESD Stormwater Management Concept Plan was approved by the Department of Permitting Services (DPS) in a letter dated May 18, 2017 (Exhibit 69).

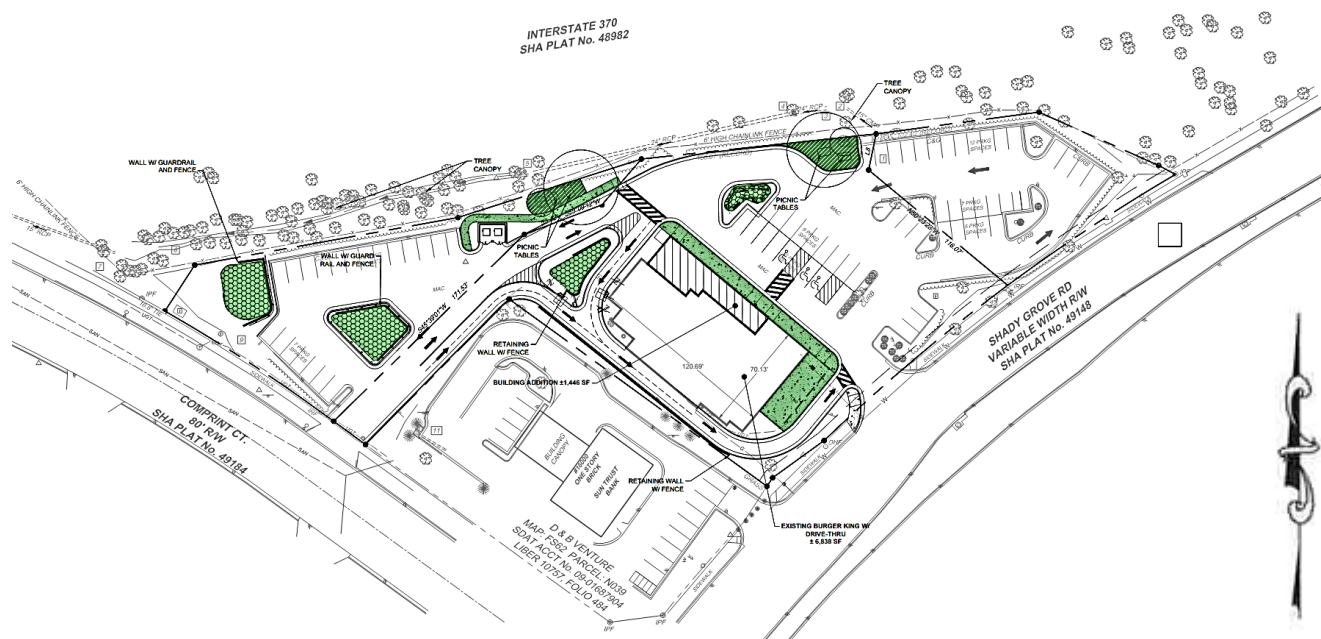
#### 4. Floor Plan and Amenity Open Space Plan

##### a. Floor Plan

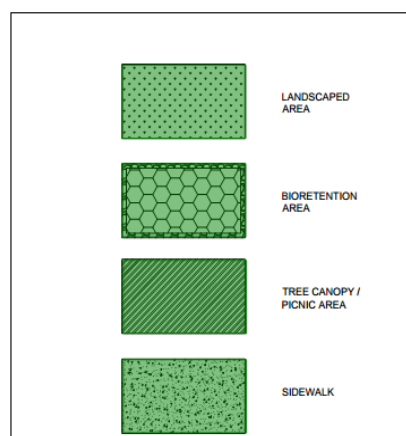
The Applicant intends to expand its existing restaurant building by an additional 1,500 square feet to create a building with a total of 8,100 square feet of floor area. The Burger King, with the drive-thru, will occupy 1,980 square feet of the floor area, with three other restaurants and a central court occupying the rest of the space, as depicted in the following floor plan (Exhibit 51(c)):



Zoning Ordinance §59.4.6.3.C. requires 10% “open space” in the GR Zone. In a property of this size (with a total area of approximately 1.71 acres), the minimum open space required would be 7,449 square feet. As shown below in its Amenity Open Space Plan (Exhibit 51(e)), the Applicant will provide 10,861 square feet of open space, which amounts to 14.58% of the property. The open spaces, shown in green, are distributed around the subject site, and two of the open areas will include picnic benches. The Open Space Plan below is the rendered version (Exhibit 68):



Total Amenity Open Space	0.25	
Total Site Area	1.71 AC	
Required Amenity Open Space = 10% of total site area.	0.17 AC	Amenity Open Space
	Required	Provided
Amenity Open Space	10%	14.58%
Canopy in Amenity Open Space	10%	10.53%
Permeable in Amenity Open Space	10%	21.80%



## 5. Operations

The Applicant described its intended operations at the subject site in its “Amended Statement in support of the application (Exhibit 51(a)):

[T]he Applicant still desires to provide multiple dining and food service options at this location. Potomac Foods intends to expand its existing restaurant building by an additional 1,500 square feet to create a building with a total of 8,100 square feet of area. Within that building there will be four food service providers, only one of which, the Burger King operation with a drive-thru window, will be the subject of this Application. The area devoted exclusively to the Burger King operation will be 1,980 square feet. Three other food providers will surround the central dining court (4,356 SF, including restrooms). There is likely to be a “coffee concept” food provider (681 SF), a “sandwich shop” (683 SF), and a “salad shop” (400 SF). Burger King’s customers who want to dine sitting down will join other diners in the common dining area; those who wish to consume their food in their cars or at an off-site location will likely purchase their food through the double drive-thru window.

Staffing of the Burger King will be the same as was proposed in the original application, that is, a total staff of as many as 40 persons with the maximum shift (between 11:00 AM and 2:00 PM) having up to twelve persons. Similarly, the hours of operation will remain the same, that is, 6:00 AM to 1:00 AM, hours that are justified by the heavy drive-by traffic during all times of the day and because of the absence of any residences in the area.

Technical Staff further described the operational flow of vehicles through the subject site (Exhibit 58, pp. 6-8):

The applicant is proposing a double drive-thru (two order windows) and a single window for payment and food delivery. . . .

It will retain the two existing vehicular access points from both roadways. The access from Shady Grove Road is limited to westbound right-in and right-out turns because of the existing raised median in Shady Grove Road. The existing driveway from Comprint Court is a full movement access where eastbound Shady Grove Road traffic can access the site via the Shady Grove Road/Comprint Court intersection. . . .

In conformance with Section 6.2.7.A.1 of the Zoning Ordinance, a restaurant must have a minimum of five queuing spaces for the drive-thru lane. There are adequate vehicular stacking distances between the entry into the drive-thru lane and the order board, and between the order board and pick-up window. In addition, the internal design must minimize vehicular and pedestrian conflicts especially for the motorists traveling to and from the drive-thru window. Additional pavement markings and

signs are needed to warn motorists of pedestrian conflicts and guide pedestrians at vehicular crossings within the site -- especially to delineate movements through the short distance between the Shady Grove Road curb cut into the north-south drive aisle in front of the proposed restaurants and the drive-thru lane exit/east-west drive aisle. The proposed internal driveways are designed such that there is no adverse impact by overflow traffic onto Shady Grove Road or Comprint Court.

Applicant's traffic engineer and transportation planner, Joseph Caloggero, testified that the on-site vehicular and pedestrian circulation would be safe, adequate and efficient. Tr. 77. There is no evidence to the contrary.

The Hearing Examiner has imposed a condition in Part IV of this Report and Decision limiting the number of on-site staff to 14 and requiring the Applicant to comply with its stated operational hours.

## **6. County Need for the Drive-Thru**

Unlike most other conditional uses, Zoning Ordinance §59.7.3.1.E.6. requires a finding that:

*a need exists for the proposed use [a Drive-Thru] due to an insufficient number of similar uses presently serving existing population concentrations in the County, and the uses at the location proposed will not result in a multiplicity or saturation of similar uses in the same general neighborhood."*

To meet this requirement, the Applicant offered a revised "Need Study" (Exhibit 63) by Thomas Flynn, an expert in projecting market needs, as well as Mr. Flynn's testimony at the hearing. Tr. 79-93. As reported by Mr. Flynn (Exhibit 63, pp. 1-2), he visited quick service restaurants ("QSRs") in the area that have drive-thrus and that feature burgers, and he interviewed fifty randomly selected individuals in the area about their use of QSRs and the need for additional QSRs with drive-thrus. He then defined a Primary Market Area as those within a 7-minute drive of the site (about 15 square miles) and a Secondary Market Area that includes consumers within a 15-minute drive, an area extending south to North Bethesda and north to Germantown.



Based on Mr. Flynn's analysis of traffic volume, the income levels of the local population, projected growth rates, the existing QSR competitors, statistical projections from the Nielson Company<sup>1</sup> and the answers to the interview questions, Mr. Flynn found that the calculations of gap/surplus underestimate the attraction that these QSRs have to the non-resident populations (*i.e.*, workers and pass-by travelers), and that there is a significant unmet demand for a QSR in the Gaithersburg Market Area, as well as for Montgomery County as a whole. Mr. Flynn also noted that the proposed action is not to add another QSR to the area but to renovate an existing and already successful establishment so that it is more efficient and in line with customer expectations. He estimated that there is a potential need for approximately 61 QSRs in the County and "[t]he many QSR's with and without drive-thrus already located in Montgomery County do not fill the gap for this type of service in the County."

Mr. Flynn concluded that "a need exists for the drive-thru burger restaurant already located at this site, and that there will not be a multiplicity or oversaturation of similar uses in the neighborhood."

There is no contrary evidence in the record. After reviewing Mr. Flynn's study, Technical Staff also concluded, "The drive-thru use at the proposed location will not result in an oversaturation of similar uses in the neighborhood." Exhibit 58, p. 18. The Hearing Examiner agrees. Even without a "Need Study," it seems obvious that there is a need for a drive-thru which is merely replacing a highly successful existing drive-thru. Tr. 17.

#### **D. Community Response**

No correspondence either for or against the application was received from the community by either the Hearing Examiner or Technical Staff (Exhibit 58, p. 11).

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<sup>1</sup> Mr. Flynn noted that "While the [Nielson] figures do not show a gap within the 7-Minute Drive Market Area, the actual facts in this situation contradict that data."

### III. FINDINGS OF FACT AND CONCLUSIONS OF LAW

A conditional use is a zoning device that authorizes certain uses provided that pre-set legislative standards are met. Pre-set legislative standards are both specific and general. General standards are those findings that must be made for almost all conditional uses. *Zoning Ordinance*, §59.7.3.1.E. Specific standards are those which apply to the particular use requested, in this case, a Drive-Thru Conditional Use allowed under Zoning Ordinance Section 59.3.5.14.E.

Weighing all the testimony and evidence of record under the “preponderance of the evidence” standard specified in *Zoning Ordinance* §59.7.1.1, the Hearing Examiner concludes that the conditional use proposed in this application, as governed by the conditions imposed in Part IV of this Report and Decision, would satisfy all of the specific and general requirements for the use.

#### A. Necessary Findings (Section 59.7.3.1.E.)

The general findings necessary to approve a conditional use are found in Section 59.7.3.1.E of the Zoning Ordinance. Standards pertinent to this review, and the Hearing Examiner’s conclusions for each finding, are set forth below:<sup>2</sup>

##### *E. Necessary Findings*

##### *1. To approve a conditional use application, the Hearing Examiner must find that the proposed development:*

##### *a. satisfies any applicable previous approval on the subject site or, if not, that the previous approval must be amended;*

Conclusion: As noted by Technical Staff, “The Property has an existing site plan approval for a Burger King with a drive-thru (No. 819810470) that the Applicant will need to abandon prior to construction of the proposed development.” Exhibit 58, p. 12. Therefore, the Hearing Examiner has followed the recommendation of the Technical Staff and the Planning Board to impose a

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<sup>2</sup> Although §59.7.3.1.E. contains six subsections (E.1. through E.6.), only subsections 59.7.3.1.E.1., E.3. and E.6. contain provisions that arguably apply to this application. Section 59.7.3.1.E.1. contains seven subparts, a. through g.

condition requiring that “Prior to release of any building permit, the existing site plan (No. 819810470) must be abandoned.” With that condition, this provision is satisfied.

***b. satisfies the requirements of the zone, use standards under Article 59-3, and to the extent the Hearing Examiner finds necessary to ensure compatibility, meets applicable general requirements under Article 59-6;<sup>3</sup>***

Conclusion: This subsection requires an analysis of the standards of the GR Zone contained in Article 59-4; the use standards for a Drive-Thru conditional use contained in Article 59-3; and the applicable development standards contained in Article 59-6. Each of these Articles is discussed below in separate sections of this Report and Decision (Parts III.B, C, and D, respectively). Based on the analysis contained in those discussions, the Hearing Examiner finds, as did Technical Staff (Exhibit 58, p. 18), that the application satisfies the requirements of Articles 59-3, 59-4 and 59-6.

***c. substantially conforms with the recommendations of the applicable master plan;***

The subject property lies within the geographic area covered by the *2010 Great Seneca Science Corridor Master Plan*. The Master Plan describes the subject site as part of the Washingtonian Light Industrial Park, which it describes as a “103-acre enclave [consisting of] a light industrial area primarily zoned I-1 with a few C-3 parcels.” (MP, p. 72).

As summarized by Technical Staff (Exhibit 58, p. 8):

The Master Plan recognizes the retail/commercial nature of the existing Burger King on the Property, but provides no specific recommendations beyond retention of the existing C-3 Zone (pages 73-4). The Master Plan makes general recommendations to reduce imperviousness, improve stormwater management, and implement other green building techniques, if there is redevelopment. The proposed drive-thru is consistent with the auto-centric commercial development typically found in the C-3 (and GR) zones. The Applicant will upgrade the stormwater management facilities to comply with current regulations, and

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<sup>3</sup> The underlined language was added by the Council when the 2014 Zoning Ordinance was amended effective December 21, 2015, in ZTA 15-09 (Ordinance No. 18-08, adopted December 1, 2015).

Environmental Site Design (ESD) techniques will be used to the maximum extent practicable in the redevelopment of the Property.

Technical Staff concluded (Exhibit 58, p. 8), “The proposed development is therefore in substantial conformance with the Master Plan.”

Conclusion: There is no evidence in the record contrary to Technical Staff’s findings on this issue. Based on this record and the minimally relevant language of the Master Plan, the Hearing Examiner concludes that the proposed conditional use substantially conforms with the recommendations of the applicable *2010 Great Seneca Science Corridor Master Plan*.

***d. is harmonious with and will not alter the character of the surrounding neighborhood in a manner inconsistent with the plan;***

Conclusion: Technical Staff found that the proposed use meets this standard (Exhibit 58, p. 16):

. . . [T]he proposed drive-thru is consistent with the recommendations of the Master Plan. The auto-centric nature of the proposed use is compatible with the similarly auto-centric development in the surrounding neighborhood.

The Hearing Examiner concludes that the proposed use “*is harmonious with and will not alter the character of the surrounding neighborhood*” because it will remain a commercial use in a commercial neighborhood, and the proposed changes will retain the existing type of use, while improving the site’s stormwater management. As noted above, it is consistent with the applicable Master Plan.

***e. will not, when evaluated in conjunction with existing and approved conditional uses in any neighboring Residential Detached zone, increase the number, intensity, or scope of conditional uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area; a conditional use application that substantially conforms with the recommendations of a master plan does not alter the nature of an area;***

Conclusion: As reported by Technical Staff (Exhibit 58, p. 16),

The Property is not located near any Residential Detached zones, nor are there any existing and approved conditional uses within the staff defined Neighborhood. As



described . . . , the conditional use substantially conforms with the recommendations of the Master Plan, and thus does not alter the nature of the area.

Based on this record, the Hearing Examiner finds that the substitution of the proposed conditional use for the existing drive-thru on the site will not result in an overconcentration of conditional uses in the area; nor will it affect the area adversely or alter the nature of the area, which is commercial, not residential. Moreover, the provision in question also specifies that “*a conditional use application that substantially conforms with the recommendations of a master plan does not alter the nature of an area,*” and as noted above, the proposed use is consistent with the Master Plan. Thus, the Hearing Examiner finds that this standard has been met.

***f. will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage, and other public facilities. If an approved adequate public facilities test is currently valid and the impact of the conditional use is equal to or less than what was approved, a new adequate public facilities test is not required. If an adequate public facilities test is required and:***

***i. if a preliminary subdivision plan is not filed concurrently or required subsequently, the Hearing Examiner must find that the proposed development will be served by adequate public services and facilities, including schools, police and fire protection, water, sanitary sewer, public roads, and storm drainage; or***

***ii. if a preliminary subdivision plan is filed concurrently or required subsequently, the Planning Board must find that the proposed development will be served by adequate public services and facilities, including schools, police and fire protection, water, sanitary sewer, public roads, and storm drainage; and***

Conclusion: According to Technical Staff, the application does not require approval of a preliminary plan of subdivision. Exhibit 58, p. 16. Therefore, under §59.7.3.1.E.1.f.i, quoted above, the Hearing Examiner must determine whether the proposed development will be served by adequate public services and facilities.

By its nature, a drive-thru serving a restaurant will not create any additional burdens for schools. As observed by Technical Staff (Exhibit 58, p. 16):

. . . The proposed development will have no impact on schools. Montgomery County Fire Station #32 is 2.1 miles from the Property, and the Montgomery County police station in Derwood is 2.3 miles away. The Property is served by public water (Water Category W-1) and sewer (Sewer Category S-1). As described on pages 8-11 of [the Staff] report, the public roads are adequate to serve the proposed development. The Department of Permitting Services (DPS) approved a Stormwater Management Concept Plan on May 18, 2017 that confirms the adequacy of storm drainage.

Moreover, the analysis by Applicant's transportation planner, Joseph Caloggero, and by Technical Staff did not find significant impacts on transportation facilities from the proposed conditional use, which essentially substitutes for the existing drive-thru. Mr. Caloggero's revised Traffic Statement (Exhibit 64) found that the existing drive-thru Burger King produces 153 new trips in the morning peak hour and 107 new trips in the evening peak hour, while the proposed Conditional Use Drive-Thru Burger King, plus the additional restaurants, will produce 168 new morning peak-hour trips and 110 new evening peak-hour trips. The net increase for the proposed use is therefore 15 new morning peak-hour trips and 3 new evening peak-hour trips.

Technical Staff analyzed that impact in accordance with Local Area Transportation Review (LATR) and Transportation Policy Area Review (TPAR), as set forth in Exhibit 58, pp. 10-11. As a Conditional Use application filed before January 1, 2017, the application was reviewed under the 2012-2016 Subdivision Staging Policy:

Local Area Transportation Review (LATR)

The Applicant submitted a revised traffic statement dated March 6, 2017, that compared the number of projected site-generated trips by the existing fast food restaurant with the proposed four fast food restaurants, while retaining a drive-thru window. For the proposed redevelopment, the net change in the number of peak-hour trips during the weekday morning peak period (6:30 to 9:30 a.m.) and the evening peak period (4:00 to 7:00 p.m.) is as follows:

Land Use	Square Feet			Weekday Peak-Hour	
	Restaurant Area	Patron Area	Total Area	Morning New (Total)	Evening New (Total)
Existing Fastfood Restaurant (Burger King)					
Fastfood with a Drive-Thru			6,589	153 (299)	107 (215)
Four Proposed Fastfood Restaurants with one Drive-Thru Window					
Fastfood with a Drive-Thru	1,980	2,309	4,289	91 (178)	65 (130)
Sandwich Shop	683	784	1,467		
Coffee Shop	681	784	1,465		
Salad Space	400	479	879		
Fastfood - no Drive-Thru	1,764	2,047	3,811	77 (150)	45 (90)
<b>Total</b>	<b>3,744</b>	<b>4,356</b>	<b>8,100</b>	<b>168 (328)</b>	<b>110 (220)</b>
<b>Net Change</b>			<b>1,511</b>	<b>+15 (29)</b>	<b>+3 (5)</b>

In the table above, the number of vehicular trips was calculated using the trip generation rates in the Institute of Transportation Engineers' (ITE) Trip Generation report for fast food restaurants. . . .

The use and occupancy certificate for the approved land uses was released at least 12 years ago as the existing fast food restaurant with a drive-thru window was built in 1977. The 2012-2016 Subdivision Staging Policy states: "if use and occupancy certificates for 75% of the originally approved development were issued more than 12 years ago... the traffic study must be based on the increased number of peak-hour trips rather than the total number of peak-hour trips."

A traffic study is not required to satisfy the LATR test because the proposed redevelopment will generate fewer than 30 additional trips within the weekday morning and evening peak periods.

#### Policy Area Review (TPAR)

Under the 2012-2016 Subdivision Staging Policy, the subject site is located within the Derwood Policy Area for the Transportation Policy Area Review (TPAR) test. For developments located in the Derwood Policy Area, the roadway test portion of the TPAR test is adequate, but the transit test is inadequate. Since the building permit will be filed after March 1, 2017, the Applicant must pay the development impact tax in lieu of the TPAR payment to Montgomery County Department of Permitting Services.

As noted above, Technical Staff concluded that "the public roads are adequate to serve the proposed development." Exhibit 58, p. 16. Based on this record, the Hearing Examiner finds

that the proposed development will be served by adequate public services and facilities. LATR standards have been met, and the substitution of the proposed Drive-Thru conditional use for the existing drive-thru will not unduly burden public facilities.

***g. will not cause undue harm to the neighborhood as a result of a non-inherent adverse effect alone or the combination of an inherent and a non-inherent adverse effect in any of the following categories:***

- i. the use, peaceful enjoyment, economic value or development potential of abutting and confronting properties or the general neighborhood;***
- ii. traffic, noise, odors, dust, illumination, or a lack of parking; or***
- iii. the health, safety, or welfare of neighboring residents, visitors, or employees.***

Conclusion: This standard requires consideration of the inherent and non-inherent adverse effects of the proposed use, at the proposed location, on nearby properties and the general neighborhood. *Inherent adverse effects* are “adverse effects created by physical or operational characteristics of a conditional use necessarily associated with a particular use, regardless of its physical size or scale of operations.” Zoning Ordinance, §59.1.4.2. *Non-inherent adverse effects* are “adverse effects created by physical or operational characteristics of a conditional use not necessarily associated with the particular use or created by an unusual characteristic of the site.” *Id.*

As specified in §59.7.3.1.E.1.g., quoted above, inherent adverse effects, alone, are not a sufficient basis for denial of a conditional use. However, non-inherent adverse effects in the listed categories, alone or in conjunction with inherent effects in those categories, are a sufficient basis to deny a conditional use. Nevertheless, the existence of a non-inherent adverse effect does not mean that an application for a conditional use must be denied. Rather, it means that it can result in denial if the Hearing Examiner finds that such a non-inherent adverse effect, either alone

or in combination with inherent adverse effects, creates “undue harm to the neighborhood” in any of the categories listed in Zoning Ordinance §59.7.3.1.E.1.g.

Analysis of inherent and non-inherent adverse effects must establish what physical and operational characteristics are necessarily associated with a Drive-Thru Conditional Use. Characteristics of the proposed use that are consistent with the characteristics thus identified will be considered inherent adverse effects. Physical and operational characteristics of the proposed use that are not consistent with the characteristics identified *or* adverse effects created by unusual site conditions, will be considered non-inherent adverse effects. The inherent and non-inherent effects then must be analyzed, in the context of the subject property and the surrounding neighborhood, to determine whether these effects are acceptable or would create adverse impacts sufficient to result in denial.

In analyzing potential adverse effects, Technical Staff considered the size, scale, scope, light, noise, traffic and environmental effects of the proposed use. Based on a 2012 Hearing Examiner report in another case, Staff determined that the following physical and operational characteristics are necessarily associated with (*i.e.*, are inherent in) a drive-thru serving a fast food restaurant (Exhibit 58, p. 17): (1) the building housing the restaurant, (2) parking facilities, (3) lighting, (4) noise generated by vehicles using the drive-in, (5) vehicular trips to and from the site by patrons and employees, and (6) long hours of operation. The Hearing Examiner agrees with that listing of inherent characteristics of a drive-thru serving a fast-food restaurant.

Applying those standards to the subject case, Technical Staff “has not identified any non-inherent adverse impacts from the proposed use.” Exhibit 58, p. 17. The Hearing Examiner agrees. While any conditional use may have some adverse effects on the neighbors (*e.g.*, from traffic, parking and lighting), there is no characteristic of the proposed use or the site that would



differentiate the effects of this proposed drive-thru serving a restaurant from any other such facility. Thus, the Hearing Examiner finds no non-inherent adverse effects.

Staff then examined the potential impacts of the proposed use (Exhibit 58, p. 17):

The proposed drive-thru will not disturb the use, peaceful enjoyment, economic value, or development potential of abutting and confronting properties or the general neighborhood. The proposed development is consistent with the auto-centric nature of the abutting and confronting properties and the general neighborhood.

The proposed drive-thru will not cause undue harm to the neighborhood due to traffic, noise, odors, dust, illumination, or a lack of parking. As described on pages 8-11 of this report, traffic will be accommodated by the existing road network. The noise, odor, dust, and illumination associated with the drive-thru will be comparable to similar facilities. Noise generated by vehicles visiting the drive-thru will be barely perceptible above the traffic noise from adjacent I-370 and Shady Grove Road. The dumpster, and any associated odors, will be located on the north side of the Property, largely hidden from view of abutting and confronting commercial properties. The illumination for the Property will be appropriate for a drive-thru restaurant facility that abuts a major highway, and parking will be provided in excess of minimum Zoning Ordinance requirements.

There will be no undue harm to the health, safety, or welfare of neighboring residents, visitors, or employees because the proposed Conditional Use meets all applicable development standards, and has adequate and safe circulation in and around the site.

Staff concluded, “There is no expected undue harm to the neighborhood because of any non-inherent adverse effect, or a combination of inherent or non-inherent adverse effects.”

Exhibit 58, p. 17.

The Hearing Examiner agrees with Staff’s conclusion and finds that the proposed drive-thru serving a restaurant, as limited by the conditions imposed in Part IV of this Report and Decision, will not cause undue harm to the neighborhood as a result of adverse effects in any of the categories listed in §59.7.3.1.E.1.g.

- 2. Any structure to be constructed, reconstructed, or altered under a conditional use in a Residential Detached zone must be compatible with the character of the residential neighborhood.***

Conclusion: This provision is not applicable since the proposed use is not in a residential zone.

- 3. The fact that a proposed use satisfies all specific requirements to approve a conditional use does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require conditional use approval.***

Conclusion: The application satisfies all specific requirements for the conditional use, and as discussed above, the proposed use will be compatible with the neighborhood. The Hearing Examiner concludes that, with the conditions imposed in Part IV of this Report and Decision, the conditional use should be approved.

- 4. In evaluating the compatibility of an agricultural conditional use with surrounding Agricultural or Rural Residential zoned land, the Hearing Examiner must consider that the impact does not necessarily need to be controlled as stringently as if it were abutting a Residential zone.***

Conclusion: This provision is not applicable since the proposed use is not “an agricultural conditional use.”

- 5. The following conditional uses may only be approved when the Hearing Examiner finds from a preponderance of the evidence of record that a need exists for the proposed use to serve the population in the general neighborhood, considering the present availability of identical or similar uses to that neighborhood:***
- a. Filling Station;***
  - b. Light Vehicle Sales and Rental (Outdoor);***
  - c. Swimming Pool (Community); and***
  - d. the following Recreation and Entertainment Facility use: swimming pool, commercial.***

Conclusion: This provision is not applicable since the proposed conditional use is not a listed use.

- 6. The following conditional uses may only be approved when the Hearing Examiner finds from a preponderance of the evidence of record that a need exists for the proposed use due to an insufficient number of similar uses presently serving existing population concentrations in the County,***

*and the uses at the location proposed will not result in a multiplicity or saturation of similar uses in the same general neighborhood:*

- a. Funeral Home; Undertaker;*
- b. Hotel, Motel;*
- c. Shooting Range (Outdoor);*
- d. Drive-Thru*
- e. Landfill, Incinerator, or Transfer Station; and*
- f. a Public Use Helipad, Heliport or a Public Use Helistop.*

Conclusion: This provision is applicable since a “Drive-Thru” is one of the listed uses, and the Need issue was addressed in Part II.C.6. at pp. 20-21 of this Report and Decision. As noted there, after reviewing Mr. Flynn’s Revised Need study (Exhibit 63), Technical Staff concluded, “The drive-thru use at the proposed location will not result in an oversaturation of similar uses in the neighborhood.” Exhibit 58, p. 18. The Hearing Examiner agrees. The Hearing Examiner also finds, based on the Revised Need Study, that there is a demonstrated County need for the proposed Conditional use. Even without a “Need Study,” it seems obvious that there is a need for a drive-thru which is merely replacing a highly successful existing drive-thru.

### **B. Development Standards of the Zone (Article 59.4)**

In order to approve a conditional use, the Hearing Examiner must find that the application meets the development standards of the zone where the use will be located – in this case, the GR Zone. Development standards for the GR Zone are contained §59.4.6.3.C. of the Zoning Ordinance. Staff compared the minimum development standards of the GR Zone to those provided by the application in a Table included in the Staff Report (Exhibit 58, p. 13):

<b>Section 4.6.3.C. GR Zone. Standard Method Development Standards (General Building)</b>		
	<b>Required / Allowed</b>	<b>Proposed</b>
<b>1. Site</b>		
Amenity open space (min)	10% (7,449 sf)	14.58% (10,861 sf)
<b>2. Lot and Density</b>		
Lot area (min)	n/a	1.71 ac
Density (max FAR)	1.5	0.11
<b>3. Placement*</b>		

Front setback (min)	0'	0'
Side setback (min)	0'	0'
Rear setback (min)	0'	0'
<b>4. Height</b>	45'	21'

\* The development standards table on the conditional use plan indicates that all proposed setbacks will be 0', but the drawing shows buildings setback greater than 0'.

Conclusion: As can be seen from the above Table, the proposed use more than meets all the development standards of the GR Zone, as provided in Zoning Ordinance §59.4.6.3.C., and the Hearing Examiner so finds. While there is a discrepancy noted by Staff between the setbacks listed in the “General Retail (GR) Zoning Data Table” on the Revised Site Layout Plan (Exhibit 51(d)) and the actual setbacks listed on the diagram portion of the Plan, the Hearing Examiner takes the listing in the Table to note the minimum setbacks applicable to this development, not the actual setbacks planned for this project, which are shown on the diagram. Since the GR Zone does not call for any minimum setback, the Hearing Examiner sees no reason to require the Applicant to impose a different minimum in its Zoning Data Table.

### **C. Use Standards for a Drive-Thru Conditional Use (Section 59.3.5.14.E.)**

The specific use standards for approval of a Drive-Thru Conditional Use are set out in Section 59.3.5.14.E. of the Zoning Ordinance. Standards applicable to this application are:

#### ***E. Drive-Thru***

##### ***1. Defined***

***Drive-Thru means a facility where the customer is served while sitting in a vehicle. Drive-Thru includes drive-thru restaurants, banks, and pharmacies, but does not include Filling Station (see Section 3.5.13.C, Filling Station).***

Conclusion: The Applicant’s proposal for a Drive-Thru serving a Burger King restaurant clearly meets the definition of a Drive-Thru in this provision, and the Hearing Examiner so finds.

## 2. Use Standards

*a. Where a Drive-Thru is allowed as a limited use, it must satisfy the following standards:*

\*

\*

\*

*vi. A conditional use application for a Drive-Thru may be filed with the Hearing Examiner if the limited use standards under Section 3.5.14.E.2.a.i through Section 3.5.14.E.2.a.iv cannot be met.*

Conclusion: The Limited Use standards are not applicable because the Applicant is not able to meet those standards for a limited use, according to Technical Staff. Exhibit 58, p. 12. Section 59.3.5.14.E.2.a.vi., quoted above, permits the Applicant to apply for a conditional use in such circumstances, as the Applicant has done in this case.

*b. Where a Drive-Thru is allowed as a conditional use, it may be permitted by the Hearing Examiner under Section 7.3.1, Conditional Use, and the following standards:*

*i. The use at the proposed location will not create a traffic hazard or traffic nuisance because of its location in relation to similar uses, necessity of turning movements in relation to its access to public roads and intersections, or its location in relation to other buildings or proposed buildings on or near the site and the traffic patterns from such buildings or cause frequent turning movements across sidewalks and pedestrian ways, thereby disrupting pedestrian circulation within a concentration of retail activity.*

Conclusion: While the required minimum space for queuing is 105 feet, the subject site provides a queuing area that extends quite a bit above that (166 feet to 218 feet). Applicant's transportation planner and traffic engineer, Joseph Caloggero, testified that there is no possibility of cars backing up a queuing line to Shady Grove Road or Comprint Court because of the operations of the restaurant; nor will the proposed use create a traffic hazard or nuisance, or create frequent conflicts with pedestrians crossing drive lanes. In his opinion, the proposed use will not have any adverse effect on capacity of the surrounding transportation network. Tr. 77.



As stated by Technical Staff (Exhibit 58, p. 12),

The proposed development will retain the Property's existing access points from Shady Grove Road and Comprint Court. The proposed drive-thru is designed to prevent traffic hazards or nuisances on Shady Grove Road and Comprint Court because ample queuing space is provided. The abutting property, located on the corner of Comprint Court and Shady Grove Road, has a bank with a drive-thru window, but turning movements at the proposed drive-thru will not impact the bank drive-thru because the bank has separate access points from the adjacent roads. The Property is located in an auto dominated area with little pedestrian traffic, so conflicts between vehicles using the proposed drive-thru and pedestrians using public sidewalks will be minimal.

Based on this record, the Hearing Examiner finds that the proposed conditional use will not create a traffic hazard or traffic nuisance, and it therefore satisfies this provision.

***ii. The use of the proposed location will not preempt frontage on any highway or public road in a way that reduces the visibility and accessibility of an interior commercial area zoned or proposed for commercial use that is oriented to the same highway or public road.***

Conclusion: As stated by Technical Staff (Exhibit 58, p. 13),

Only one building is proposed and the Property has no interior commercial area that would be blocked by the proposed drive-thru. The proposed drive-thru will not impact the visibility or accessibility of the bank on the abutting property.

The Hearing Examiner finds that the proposed conditional use will not preempt frontage in a way that reduces visibility or accessibility of an interior commercial area, and it therefore satisfies this provision.

***iii. Product displays, parked vehicles, and other obstructions that adversely affect visibility at intersections, or at entrances and exits to and from the Drive-Thru are prohibited.***

Conclusion: As stated by Technical Staff (Exhibit 58, p. 13),

The Applicant does not propose product displays, vehicle parking, or other obstructions that would adversely affect visibility at the Property's ingress and egress driveways. Parked vehicles will be separated from the proposed drive-thru entrances and exits by a drive aisle or physical barrier, allowing appropriate visibility of the drive-thru lane.

Based on this record, the Hearing Examiner finds that the proposed conditional use will not have product displays, vehicle parking, or other obstructions that would adversely affect visibility at intersections, or at entrances and exits to and from the drive-thru. The proposal therefore satisfies this provision.

*iv. When a Drive-Thru occupies a corner lot, the ingress or egress driveways must be located a minimum of 20 feet from the intersection of the rights-of-way, and such driveways must not exceed 25 feet in width. In areas where no master plan of highways has been adopted, the street line must be considered to be a minimum of 60 feet from the centerline of any abutting street or highway.*

Conclusion: This provision is inapplicable because the use does not occupy a corner lot.

In sum, the Hearing Examiner finds that the application satisfies all of the use standards for a Drive-Thru Conditional Use set forth in Zoning Ordinance Section 59.3.5.14.E.2.b., as well as the general Conditional Use standards contained in Zoning Ordinance §59.7.3.1, discussed in Part III.A., above.

#### **D. General Development Standards (Article 59.6)**

Article 59.6 sets the general requirements for site access, queuing, parking, screening, open space, landscaping, lighting, and signs. The applicable requirements, and whether the use meets these requirements, are discussed below.

##### **1. Site Access and Queuing Standards**

Conclusion: Zoning Ordinance Division 59.6.1 sets the standards for “Site Access,” including access to a site in an Employment Zone where approval of a conditional use is required. Section 59.6.1.2. Since General Retail zones, such as the GR 1.5 H-45 Zone involved in this case, are categorized as a type of Employment Zone (§59.2.1.3.E.1.a), the proposed access must comply with the site access standards of Division 59.6.1.

The General Standards for Site access are set forth in Section 59.6.3.A:

***A. Any development must:***

- 1. allow a vehicle, pedestrian, or bicycle to enter and exit the property to and from a street or an abutting site safely;***
- 2. limit vehicle access across a primary pedestrian, bicycle, or transit route wherever feasible;***
- 3. allow a vehicle to enter and exit any on-site parking area in a forward motion; and***
- 4. allow a vehicle to access any pad site from within the site.***

A Table in Section 59.6.4.A. provides that a one-way driveway in the GR Zone must be a minimum of 12 feet wide and a two-way driveway must be a minimum of 20 feet wide.

Applicant's revised Site Layout Plan (Exhibit 51(d)) demonstrates that the access off of Comprint Court is 30 feet wide, which then divides into a two-way drive 20 feet in width and a 10-foot-wide, one-way segment which widens to 12 feet wide when it no longer parallels the two-way drive. It then merges with another 12-foot, one-way drive to pass the drive-thru windows and exit the site. The entrance access on Shady Grove Road is approximately 26 feet wide. Thus, the proposed driveways meet the minimum width requirements for site access.

The Applicant's plan also significantly improves safe pedestrian access to the site, consistent with the provisions of Section 59.6.3.A, quoted above, as testified by Lee Ann Gudorp, Applicant's Site Design expert (Tr. 40-41):

. . . [W]e're maintaining the access off of Shady Grove Road and on Comprint Court. Shady Grove Road is a ride-in, ride-out due to the existing median and Comprint Court is full access. So those are . . . no changes to access to the site. . . . [W]e are adding the additional drive-through lane to the northwest of the building; and another item to point out is the improvement for the pedestrian connectivity. We're now adding a sidewalk that connects to the Shady Grove sidewalk so you'll be able to walk from Shady Grove Road into the site. We have crosswalks marked for pedestrians. You can come to the front of the store and then also the lower parking area, we now have added a sidewalk that you'll be able to walk from the lower parking area behind the dumpster with a crosswalk to the front of the building. Now, this is a major improvement from the site today since there are no sidewalks that could lead a customer to the front of the building, so they're literally just walking in the drive access.

Technical Staff has also determined that access to the site will not present any traffic hazards. As stated by Staff (Exhibit 58, pp. 8-12):

The Property . . . will retain the two existing vehicular access points from both roadways. The access from Shady Grove Road is limited to westbound right-in and right-out turns because of the existing raised median in Shady Grove Road. The existing driveway from Comprint Court is a full movement access where eastbound Shady Grove Road traffic can access the site via the Shady Grove Road/Comprint Court intersection.

\* \* \*

. . . The proposed drive-thru is designed to prevent traffic hazards or nuisances on Shady Grove Road and Comprint Court because ample queuing space is provided.

No problems with site access have been raised in this case.

We now turn to Section 59.6.2.7, which specifies the standards for on-site queuing and safe on-site circulation.

#### ***Section 6.2.7. Queuing Design Standards***

##### ***A. Spaces Required***

***1. A Restaurant must have a minimum of 5 queuing spaces for each drive-thru lane.***

***2. Any non-Restaurant use must have a minimum of 3 queuing spaces for each drive-thru lane.***

##### ***B. Design***

***1. A queuing space must be the same size as a standard parallel parking space under Division 6.2.***

***2. A vehicle must be able to use a drive-thru facility without encroaching on or interfering with the public use of streets and sidewalks.***

***3. Any aisle to accommodate queuing must be clearly marked or physically separated from driveway aisles, parking spaces, and pedestrian walkways.***

***4. Each queuing space must satisfy the parking lot landscaping and lighting requirements in Section 6.2.9.***

Conclusion: As specified above, drive-thru lanes must have queuing space for five cars (105 feet per lane). Technical Staff reports that the proposed lanes will far exceed that (Exhibit 58, p. 15):

The proposed drive-thru lane accessed from Comprint Court has 218 feet of queuing space, measured from the drive-thru lane entrance to the order pick-up window, enough space for approximately 10 cars to queue. The drive-thru lane accessed from Shady Grove Road has queuing space for approximately four additional cars.

Vehicles using the drive-thru lanes will not encroach or interfere with the public use of Shady Grove Road or Comprint Court, or the abutting sidewalks. The queuing areas will be marked or physically separated from driveway aisles, parking spaces and pedestrian walkways.

This evidence is not disputed, and the Hearing Examiner therefore finds that the queuing standards of Zoning Ordinance §59.6.2.7. are more than satisfied.

Moreover, Applicant's transportation planner and traffic engineer, Joseph Caloggero, testified that access to the site and internal circulation, including queuing, would be safe and efficient. Tr. 77. Technical Staff also concluded that "the proposed Conditional Use meets all applicable development standards, and has adequate and safe circulation in and around the site." Exhibit 58, p. 17.

Based on this record, the Hearing Examiner finds that the proposed site will have adequate queuing space, as well as safe access and circulation.

## **2. Parking Spaces Required, Parking Facility Design and Parking Lot Screening**

The standards for the number of parking spaces required, parking setbacks and parking lot screening are governed by Division 6.2 of the Zoning Ordinance. The required spaces and setback standards are referenced in the Table on page 14 of the Staff report (Exhibit 58). It is reproduced below:



**Division 6.2. Parking, Loading, and Queuing**

	<b>Required</b>	<b>Provided</b>	<b>Reference</b>
Vehicle Parking, including:	33 spaces	72 spaces	Section 6.2.4.B
• Handicapped	• 2 spaces + 1 van accessible space	• 3 van accessible spaces	Section 6.2.3.B
• Car-share spaces	• 1 space	• 1 space	Section 6.2.3.D
Motorcycle Parking	2 spaces	2 spaces	Section 6.2.3.C
Bicycle Parking	1 space (long term)	1 space (long-term)	Section 6.2.4.C
Queuing Spaces	5 per drive-thru lane (105' per lane)	166' - 218' per drive-thru lane	Section 6.2.7
<b>Parking Lot Landscaping</b>			
• Landscaped Area	5% of parking lot area: 1,860 sf	5,605 sf	Section 6.2.9.C.1
• Tree Canopy	25% coverage: 9,298 sf canopy area	13,091 sf	Section 6.2.9.C.2
• Perimeter Planting	• 6 ft wide • Hedge 3 ft high • Canopy trees 30' on center	Satisfied except where the proximity of utilities precludes the planting of canopy trees	Section 6.2.9.C.3

***a. Number and Design of Parking Spaces Required by Sections 59.6.2.4., 5. and 6.***

Conclusion: As can be seen from the above Table, Section 59.6.2.4 of the Zoning Ordinance requires 4 vehicle parking spaces per 1,000 square feet of gross floor area (GFA). Since the Applicant plans a total of 8,100 square feet of GFA, a total of 33 parking spaces for the subject site would be required ( $8.1 \times 4 = 32.4$  spaces, which rounds up to 33). The Applicant complies by providing 72 on-site parking spaces. Technical Staff states (Exhibit 58, p. 14):

The Applicant proposes to provide more than the required number of parking spaces. For vehicle parking, four parking spaces per 1,000 sf of GFA, or 33 spaces, are required. The Applicant is proposing 72 spaces, including one car-share space and three van accessible handicapped spaces. In addition to vehicle parking, the Applicant will provide two motorcycle parking spaces, and one long-term bicycle parking space.

In addition to the number of parking spaces, Technical Staff points out that “the Proposal satisfies the applicable general vehicle parking design standards under Section 6.2.5.” Exhibit 58, p. 15.

The Applicant will also comply with Sections 59.6.2.4.C and 59.6.2.6.A. by providing one long-term, weather-protected bicycle parking space on the site, as called for in a condition recommended by Technical Staff and included in Part IV of this Report and Decision.

Based on this record, the Hearing Examiner finds that the Applicant’s proposal is compliant with the above provisions specifying the number of required vehicle and bicycle parking spaces and their design.

***b. Parking Setbacks, Screening and Landscaping***

Conclusion: With regard to the landscaping requirements for the parking facility, Technical Staff reported that “Proposed landscape plantings include shrubs and trees between the parking lot/drive-thru lane and both road frontages. New microbioretention areas will also be added to the parking lot.” Exhibit 58, p. 6. The Table from the Technical Staff report reproduced above indicates that the Applicant will meet all the parking facility landscaping requirements “except where the proximity of utilities precludes the planting of canopy trees.” The Hearing Examiner finds that this exception does not render the subject site incompatible with its surroundings, for as observed by Technical Staff, “The auto-centric nature of the proposed use is compatible with the similarly auto-centric development in the surrounding neighborhood.” Exhibit 58, p. 16. In sum, the proposal meets all parking facility setback, screening and landscaping requirements to the extent needed for compatibility with the surrounding area.

**3. Open Space Requirements**

Conclusion: Zoning Ordinance §59.4.6.3.C. requires 10% open space in the GR Zone, as indicated in Technical Staff’s Table, reproduced on page 32 of this Report and Decision. The

Applicant's rendered Open Space Plan (Exhibit 68) is shown on page 18 of this Report and Decision. As discussed there, in a property of this size (with a total area of approximately 1.71 acres), the minimum open space required would be 7,449 square feet. The Applicant will provide 10,861 square feet of open space, which amounts to 14.58% of the property. Based on this information, the Hearing Examiner finds that the Applicant's proposal more than meets the open space requirements of the Zoning Ordinance. The open spaces are distributed around the subject site, and two of the open areas will include picnic benches.

#### **4. Site Landscaping, Screening and Lighting**

Standards for site lighting are set forth in Division 6.4 of the Zoning Ordinance, and the standards for landscaping and screening are mainly set forth in Division 6.5.

##### ***a. Lighting***

Conclusion: Three provisions in Division 6.4 of the Zoning Ordinance should be considered in evaluation of the lighting proposed in this case, Sections 59.6.4.4.B, D. and E.

##### ***B. Design Requirements***

###### ***1. Fixture (Luminaire)***

*To direct light downward and minimize the amount of light spill, any outdoor lighting fixture must be a full or partial cutoff fixture.*

###### ***2. Fixture Height***

*A freestanding lighting fixture may be a maximum height of 40 feet in a parking lot with a minimum of 100 spaces, otherwise a freestanding lighting fixture may be a maximum height of 30 feet within a surface parking area and may be a maximum height of 15 feet within a non-vehicular pedestrian area. A freestanding light fixture located within 35 feet of the lot line of any detached house building type that is not located in a Commercial/Residential or Employment zone may be a maximum height of 15 feet. The height of a freestanding lighting fixture must be measured from the finished grade.*

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##### ***D. Excessive Illumination***

*Except where otherwise stated in this Chapter, on-site illumination must be 0.5 footcandles or less at the lot line, excluding street lights within the right-of-way.*

***E. Conditional Uses***

***Outdoor lighting for a conditional use must be directed, shielded, or screened to ensure that the illumination is 0.1 footcandles or less at any lot line that abuts a lot with a detached house building type, not located in a Commercial/Residential or Employment zone.***

Lee Ann Gudorp, Applicant's Site Design expert, testified regarding lighting proposed for the site (Tr. 55-56):

We're proposing the use of LED lighting fixtures for the property, and they are shown on the Lighting Notes and Details exhibit. We're going to have the, your parking lot light poles which will be this, the area light. And then also there will be a wall pack sconce along the drive through lane. There's going to be two wall packs in this area. We've got a total of 11 site lights that are going to be dispersed throughout the site. There are four that have the double heads and seven that are the single. We've got the double in the main, well, in the upper parking area in these two islands and then perimeter for the single light poles around the perimeter of the site and the two other single lights are located adjacent to the bio retention drain of the building and then the lower bio retention.

In response to the Hearing Examiner's questions, Ms. Gudorp further testified that the lighting will be adequate for safety, will be directed downward and will not unduly intrude into surrounding properties. Tr. 55-56.

We are not exceeding .5 foot candle levels at the perimeter. . . Everything is pointed down so there's no over-spilling of light.

Technical Staff found that (Exhibit 58, p. 17):

The illumination for the Property will be appropriate for a drive-thru restaurant facility that abuts a major highway.

Conclusion: Based on this record, the Hearing Examiner finds that the quoted provisions of the Zoning Ordinance will be satisfied. The light fixtures will be designed to point down and will not spill light into adjoining properties. There will not be excessive illumination for this type of use, and the subject site does not abut a lot with a detached house building type, The Hearing Examiner thus finds that the site lighting is compatible with the neighborhood.

***b. Site Screening and Landscaping***

Conclusion: Although some provisions in this portion of the Zoning Ordinance contain very specific screening requirements, the provisions governing the general landscaping and screening for conditional uses in an Employment Zone, such as the GR Zone, specify the landscaping and screening only if the subject lot abuts property in an Agricultural, Rural Residential, or Residential zone. Zoning Ordinance §59.6.5.2.C. This language is reinforced by Section 59.7.3.1.E.1.b., under which the Hearing Examiner need only find that the proposed use meets applicable general requirements under Article 59-6 “to the extent the Hearing Examiner finds necessary to ensure compatibility. . .”

Lee Ann Gudorp, Applicant’s expert in Site Design, testified that Applicant will supplement the trees along Shady Grove with additional shrubs and plantings and also some foundation planting around the building. The proposed micro-bioretenment basins on the site will be planted as well. Trees will be added along the parking row, and plantings around the dumpster and on the north end of the site. According to Ms. Gudorp, the Applicant will exceed landscaping requirements. Tr. 48-49.

Technical Staff reports that “Proposed landscape plantings include shrubs and trees between the parking lot/drive-thru lane and both road frontages.” Exhibit 58, p. 6. Staff reported no deficiency in the proposed site landscaping and screening.

Based on this record, the Hearing Examiner finds that the proposed site landscaping and screening are sufficient to ensure compatibility with the surrounding commercial neighborhood and thus will meet the requirements of the Zoning Ordinance.

**5. Signage**

Conclusion: The use of signage is governed by Zoning Ordinance Division 6.7. As noted in Section II.C.2. of this Report and Decision, the Revised Site Layout (Exhibit 51(d)) depicts the



locations of the existing Burger King signs at the two entrances, and notes that they will both remain. Staff found that “The Applicant has complied with signage requirements along the Shady Grove Road and Comprint Court frontages.” Exhibit 58, p. 11.

There is no evidence to the contrary, and the Hearing Examiner finds Applicant’s signs to be compatible with this commercial neighborhood. If the Applicant subsequently elects to change those signs, any signage must comply with applicable Zoning Ordinance standards and is subject to permits issued by the Department of Permitting Services. A condition is imposed in Part IV of this Report and Decision to that effect.

#### **IV. CONCLUSION AND DECISION**

As set forth above, the application meets all the standards for approval in Articles 59-3, 59-4, 59-6 and 59-7 of the Zoning Ordinance. The proposed conditional use complies with the general conditions and the standards for approval of a conditional use for a Drive-Thru, subject to the recommended conditions of approval. The proposed conditional use is consistent with the objectives and recommendations of the Master Plan, will not alter the character of the surrounding neighborhood, and will not result in any unacceptable noise, traffic, or environmental impacts on surrounding properties.

Based on the foregoing findings and conclusions and a thorough review of the entire record, the application of Potomac Foods Real Estate, LLC (CU 17-03), for a conditional use under Section 59.3.5.14.E, of the Zoning Ordinance, to build and operate a drive-thru servicing a Burger King Restaurant at 16004 Shady Grove Road, Gaithersburg, Maryland is hereby ***GRANTED***, subject to the following conditions:

1. The Applicant must obtain approval of a Final Forest Conservation Plan consistent with the approved Preliminary Forest Conservation Plan prior to any clearing, grading or demolition on the site.

2. The Applicant must satisfy the Transportation Policy Area Review (TPAR) test by paying updated General District Transportation Impact Tax to Montgomery County Department of Permitting Services. The timing and amount of the payment will be in accordance with Chapter 52 of the Montgomery County Code, and any amendments to this chapter.
3. The Applicant must provide at least one long-term bicycle parking space consisting of a bike locker in a well-lit location or a designated secured bike room for employees.
4. Prior to release of any building permit, the existing site plan (No. 819810470) must be abandoned.
5. The Applicant is bound by its site layout and other plans filed this case (Exhibits 51(a) through 51(m)).
6. The Burger King and the associated drive-thru may be open for business from 6:00 a.m. until 1:00 a.m. 7 days a week. The restaurant may employ up to 45 people, with up to 14 employees on site during the busiest shift from 11:00 a.m. to 2:00 p.m.
7. Any signage must comply with applicable Zoning Ordinance standards, and the Applicant must obtain sign permits issued by the Department of Permitting Services.
8. The Applicant must obtain and satisfy the requirements of all licenses and permits, including but not limited to building permits and use and occupancy permits, necessary to occupy the conditional use premises and operate the conditional use as granted herein. The Applicant shall at all times ensure that the conditional use and premises comply with all applicable codes (including but not limited to building, life safety and handicapped accessibility requirements), regulations, directives and other governmental requirements, including the annual payment of conditional use administrative fees assessed by the Department of Permitting Services.

Issued this 25<sup>th</sup> day of July, 2017.



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Martin L. Grossman  
Hearing Examiner

#### NOTICE OF RIGHT TO REQUEST ORAL ARGUMENT

Any party of record may file a written request to present an appeal and oral argument before the Board of Appeals, within 10 days after the Office of Zoning and Administrative Hearings issues

the Hearing Examiner's Report and Decision. Any party of record may, no later than 5 days after a request for oral argument is filed, file a written opposition to it or request to participate in oral argument. If the Board of Appeals grants a request for oral argument, the argument must be limited to matters contained in the record compiled by the Hearing Examiner. A person requesting an appeal, or opposing it, must send a copy of that request or opposition to the Hearing Examiner, the Board of Appeals, and all parties of record before the Hearing Examiner.

Contact information for the Board of Appeals is listed below, and additional procedures are specified in Zoning Ordinance §59.7.3.1.F.1.c.

The Board of Appeals may be contacted at:

Montgomery County Board of Appeals  
100 Maryland Avenue, Room 217  
Rockville, MD 20850  
(240) 777-6600

<http://www.montgomerycountymd.gov/boa/>

The Board of Appeals will consider your request for oral argument at a work session. Agendas for the Board's work sessions can be found on the Board's website and in the Board's office. You can also call the Board's office to see when the Board will consider your request. If your request for oral argument is granted, you will be notified by the Board of Appeals regarding the time and place for oral argument. Because decisions made by the Board are confined to the evidence of record before the Hearing Examiner, no new or additional evidence or witnesses will be considered. If your request for oral argument is denied, your case will likely be decided by the Board that same day, at the work session.

Parties requesting or opposing an appeal must not attempt to discuss this case with individual Board members because such *ex parte* communications are prohibited by law. If you have any questions regarding this procedure, please contact the Board of Appeals by calling 240-777-6600 or visiting its website: <http://www.montgomerycountymd.gov/boa/>.

NOTICES TO:

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